

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 11,170
JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED OCT 9 1951

CAPITAL TRANSIT COMPANY

Frank A. Stewart
6000 Appellant, **CLERK**

v.

MARY MARGARET HOWARD, Administratrix of the Estate of
EDWARD T. HOWARD, deceased, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,170

CAPITAL TRANSIT COMPANY, *Appellant*,

v.

MARY MARGARET HOWARD, Administratrix of the Estate of
EDWARD T. HOWARD, deceased, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

483 Filed Aug 10 1948 Harry M. Hull, Clerk

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Mary Margaret Howard
Administratrix of the Estate of
Edward T. Howard, Dec'd.
5604 Nevada Avenue, N. W.
Washington, D. C.

Plaintiff

v.

Capital Transit Company
A corporation
36th & M Streets, N. W.
Washington, D. C.

Defendant

Civil Action No. 3293—48

Complaint for Damages
(Death resulting from vehicle accident)

1. The jurisdiction of this Court is based upon Title 11, Section 306, et seq., of the District of Columbia Code (1940), as well as Title 16, Section 1201 of the District of Columbia Code (1940).

2. The plaintiff, Mary Margaret Howard, is the administratrix of the estate of Edward T. Howard, deceased, under and by virtue of the order of the District Court of the United States for the District of Columbia, Holding a Probate Court.

3. The defendant is a common carrier of passengers for hire in the District of Columbia.

4. The plaintiff alleges that on, to wit, March 23, 1948 the deceased was a passenger on a vehicle of the defendant and while the deceased was alighting from the

said bus at Connecticut Avenue and McKinley Streets, N. W., Washington, D. C., on the date aforesaid, the defendant, acting through its agents, servants and employees, negligently, carelessly and recklessly closed the door of the said vehicle prior to the time that the deceased had fully elighted, and, acting as aforesaid, negligently and carelessly failed to keep a proper look-
 484 out for the deceased at that time alighting, and negligently, carelessly and recklessly closed the door on said decedent and dragged him to his death.

5. The decedent was survived by his wife, the administratrix herein, and by three children, John Joseph Howard, aged 12 years, Rosemary Howard, aged 11, and Melissa Howard, under one year, all of whom were dependent upon the decedent for support and all of whom have been pecuniarily damaged by reason of the carelessness and recklessness of the defendant in causing the death of the plaintiff's intestate, all as aforesaid.

Wherefore, the plaintiff as administratrix of the estate of Edward T. Howard sues the defendant for ten thousand dollars (\$10,000) and costs.

/s/ William E. Leahy
 William E. Leahy

/s/ James F. Reilly
 James F. Reilly
 821 15th Street, N. W.
 Washington, D. C.
 Attorneys for Plaintiff

(The plaintiff demands a trial by jury herein).

/s/ William E. Leahy
 William E. Leahy

/s/ James F. Reilly
 James F. Reilly
 Attorneys for Plaintiff

485 Filed Aug 18 1948 Harry M. Hull, Clerk

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

MARY MARGARET HOWARD

Administratrix of the Estate of
Edward T. Howard, Dec'd.
5604 Nevada Avenue, N. W.
Washington, D. C.

Plaintiff

v.

CAPITAL TRANSIT COMPANY

a corporation
36th and M Streets, N. W.
Washington, D. C.

Defendant

Civil Action No. 3293—48

Answer to Complaint

First Defense

1, 2 and 3. Defendant, Capital Transit Company, a corporation, admits the allegations of paragraphs 1, 2 and 3 of the Complaint.

4. Defendant admits that on March 23, 1948, a fatal accident occurred between plaintiff's decedent and one of its buses near the intersection of Connecticut Avenue and McKinley Streets, N. W., Washington, D. C. It denies the remaining allegations in paragraph 4 of the Complaint.

5. Defendant admits that decedent was survived by his wife, the plaintiff herein, and by the three minor

children of the names and ages mentioned. It is without knowledge or information sufficient to form a belief respecting the truth of the allegations respecting dependency for support of the named persons upon plaintiff's decedent. It denies the remaining allegations in paragraph 5 of the Complaint.

6. Defendant denies the remaining allegations in the Complaint not herein specifically answered.

Second Defense

The injuries and damages, if any, allegedly sustained by the plaintiff and the next of kin of the decedent resulted solely from negligence and carelessness on the part of the decedent at the time and place mentioned in the Complaint.

486

Third Defense

The injuries and damages, if any, allegedly sustained by the plaintiff and next of kin of the decedent resulted from contributory negligence on the part of the decedent at the time and place mentioned in the Complaint.

HOGAN & HARTSON

By /s/ Geo. D. Horning, Jr.

/s/ Frank Roberson

Attorneys for Defendant

810 Colorado Building

Washington, D. C.

A copy of the foregoing Answer was mailed this 17th day of August, 1948, to William E. Leahy and James F. Reilly, 821 - 15th Street, N. W., Washington, D. C., Attorneys for Plaintiff.

HOGAN & HARTSON

By /s/ Geo. D. Horning, Jr.

Attorneys for Defendant

487 Filed Mar 24 1950 Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOWARD, Plaintiff

v.

C. T. C. Defendant

Civil Action No. 3293—48

Pretrial Proceedings

STATEMENT OF NATURE OF CASE: Suit for death by wrongful act brought by widow of decedent as administratrix of his estate.

Plaintiff claims that while decedent was a passenger in a bus and alighting from bus at Conn. Avenue and McKinley Sts., defendant's operator of bus negligently closed rear door so as to catch hold of decedent and started bus, causing decedent to fall and sustain injuries from which he died. Suit is brought under the Dist. of Col. Lord Campbell's Act., decedent having left wife and three children.

Defendant denies any negligence on its part and claims accident was caused solely by negligence of decedent, that decedent's coat, clothing or some part of his body was caught in the door of the bus; that the accident occurred while decedent was entirely outside of the bus. Defendant claims negligence or contributory negligence of decedent.

STIPULATIONS:

Parties stipulate that plaintiff's decedent's death occurred as a result of accident in which bus was involved at Conn. Avenue and McKinley St.

Parties stipulate that a man, 42 years of age, according to Mortality Tables, has an expectancy of 26.32 years, according American Mortality Tables.

Photographs bearing initials of the Court may be received in evidence without formal proof subject to objections as to relevancy and materiality.

488 Plaintiff is given 5 days in which to propound additional interrogatories, if advised.

STIPULATIONS: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustice:

/s/ Bolitha J. Laws
Pretrial Justice.

Dated March 24, 1950.

REMARKS of Pretrial Justice for consideration of Trial Justice:

Attorneys authorized to act:

/s/ J. F. Reilly
Attorney for Plaintiff

/s/ Paul R. Connally
Attorney for Defendant

489 Filed Jan 20 1951 Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mary Margaret Howard, Administratrix
Plaintiff

vs.

Capital Transit Company
A corporation

Defendant

Civil Action No. 3293—48

Motion to Amend Pretrial Order

Comes now the plaintiff, pursuant to the Federal Rules of Civil Procedure (15-16), and respectfully requests this Court to permit the pretrial proceedings entered herein

on March 24, 1950, to be amended so that the plaintiff's allegations of negligence shall consist of:

1. The defendant, acting through its agent (operator of the bus), failed to keep a proper lookout for the decedent until he had safely alighted from the bus.

2. The defendant, acting through its agent (operator of the bus), started the bus before the decedent, a passenger, had safely alighted from the bus.

3. The management and operation of the vehicle on which the deceased was a passenger, together with the means of egress from the vehicle, were under the control of the defendant common carrier. Before the plaintiff's deceased had safely alighted therefrom, the defendant, through the operator, started the bus. The decedent's clothes or some portion of his body were caught within the means of egress provided by the carrier. The decedent was dragged or thrown under the bus and to his death.

/s/ James F. Reilly
James F. Reilly
Attorney for Plaintiff
821 15th Street, N. W.
Washington 5, D. C.

490 Filed Feb 13 1951 Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mary Margaret Howard, Administratrix
Plaintiff

vs.

Capital Transit Company
A corporation
Defendant

Civil Action No. 3293—48
Order Amending Pretrial Order

Upon consideration of the motion of the plaintiff to amend the pretrial order and no objection being made by the defendant, it is by the Court this 12th day of February, 1951

ORDERED that the pretrial proceedings, entered herein March 24, 1950, be amended so that the plaintiff's allegations of negligence shall consist of:

1. The defendant, acting through its agent (operator of the bus), failed to keep a proper lookout for the decedent until he had safely alighted from the bus.

2. The defendant, acting through its agent (operator of the bus), started the bus before the decedent, a passenger, had safely alighted from the bus.

3. The management and operation of the vehicle on which the deceased was a passenger, together with the means of egress from the vehicle, were under the control of the defendant common carrier. Before the plaintiff's deceased had safely alighted therefrom, the defendant, through the operator, started the bus. The dece-

dent's clothes or some portion of his body were caught within the means of egress provided by the carrier. The decedent was dragged or thrown under the bus and to his death.

By the Court
/s/ Burnita Shelton Matthews
Judge

Seen:

/s/ Geo. D. Horning, Jr.
George D. Horning, Jr.
Attorney for Defendant

491 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mary Margaret Howard, Admx. etc. Plaintiff,

vs.

Capital Transit Company, Defendant.

Civil Action No. 3293—48
(Excerpt from Docket entries)

<i>Date</i>	<i>Proceedings</i>	<i>Fees</i>	<i>Total</i>
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1951

Feb. 9	Motion of pltf. for leave to amend pre-trial order granted. (Order to be presented); reported by F. J. Attig. Matthews, J.		
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" 13	2-12-51	Order amending pretrial order	
		Matthews, J. (N)	

492 Filed Apr 23 1951 Harry M. Hull, Clerk

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Mary Margaret Howard, Admx.
Estate of Edward T. Howard, Dec'd.
Plaintiff

vs.

Capital Transit Company
Defendant

Civil No. 3293—48

Verdict and Judgment

This cause having come on for hearing on the 13 day of April, 1951, before the Court and a jury of good and lawful persons of this district, to wit:

1 Louise M. Moore	7 Edward N. Tracy
2 Patrick Ja. Clooney	8 Julia A. Green
3 Robert E. Fisher	9 Ann Douglas
4 Austin I. Saunders, Jr.	10 Anna V. Street
5 James P. Callahan	11 William M. Keiser
6 James B. Hawkins	12 Charles F. Grochowsky
and Wilbur E. Beall, Alternate	

who, after having been duly sworn to well and truly try the issues between Mary Margaret Howard, Admx. Estate of Edward T. Howard, Decs'd, plaintiff and Capital Transit Company, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 23rd day of April, 1951, that they find the issues aforesaid in favor of the plaintiff, and that the money payable to him by the defendant by reason of the premises is the sum of Ten Thousand Dollars no/100 (\$10,000)

Wherefore, it is adjudged that said plaintiff recover of the said defendant the sum of Ten Thousand Dollars (\$10,000.00) and no/100 together with costs.

Harry M. Hull
Clerk,

By Wm. A. Yates
Deputy Clerk.

By direction of
Justice D. A. Pine

493 Filed Apr 30 1951 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARY MARGARET HOWARD

Plaintiff

v.

CAPITAL TRANSIT COMPANY

Defendant

Civil Action No. 3293-48

*Motion for Judgment N.O.V. or, in the Alternative,
For a New Trial Pursuant to Rule 50 (b) of the
Federal Rules of Civil Procedure*

Comes now the defendant, by its attorney, and moves the Court for entry in the above entitled cause of judgment for the defendant notwithstanding the verdict of the jury in plaintiff's favor or, in the alternative, for a new trial and for grounds therefor says, as follows:

1. The Court erred in denying the motion of the defendant for a directed verdict upon the conclusion of all of the evidence upon the ground, as stated in said motion, that there was no substantial or credible evidence in support of the three essential elements of plain-

tiff's case entitling submission of these issues to the jury and upon the further ground that there was no evidence in the case from either side of a state of disrepair in the doors, a condition precedent to submission to the jury of two of plaintiff's three essential allegations.

2. The Court erred in admission of evidence, over defendant's objection and exception, of testimony of plaintiff respecting decedent's habit of using facilities of the defendant in going to and returning from his work as proof of plaintiff's essential allegation that decedent was a passenger on this particular bus immediately prior to and at the time of the accident.

3. The Court erred in admission of evidence, over defendant's objection and exception, of the schedule of Capital Transit buses on the night in question from Twining City Terminal to Eighteenth and I Streets and Twentieth and K Streets, N. W. and from there to Chevy Chase Circle, such evidence being admitted as
494 proof of plaintiff's essential allegation that the decedent was a passenger on this particular bus immediately preceding and at the time of the accident on the night in question.

4. The verdict of the jury was contrary to the evidence.

5. The verdict of the jury was contrary to the weight of the evidence.

6. And for other reasons to be advanced upon the hearing of this motion.

HOGAN & HARTSON

By Geo. D. Horning Jr.

Attorneys for Defendant

810 Colorado Building

Washington, D. C.

* * * *

6

Mary Margaret Howard,

* * * *

Direct Examination

* * * *

BY MR. REILLY:

Q Mrs. Howard, will you speak up, please, so we all can hear you and give your name and address, please?

A Mary Margaret Howard, 5604 Nevada Avenue, Northwest.

Q What relation were you to Edward T. Howard, the deceased? A I was his wife.

Q What did the family consist of, Mrs. Howard? A Myself and the three children.

Q Those whom I have identified here today? A Yes.

Q How long had you been married? A We had been married at that time 13 years.

* * * *

7 Q Where was your husband employed? A At the Washington Terminal Company.

Q What were his hours of employment? A 9 a.m. to 5 p.m.

Q And, on occasions, did he have longer hours than that? A Oh, yes, very frequently.

Q How many days a week, normally, did he work? A Usually seven.

Q What was the nature of his work? A He was a Diesel machinist.

Q When you say the Washington Terminal Company, where was that located? A That is the Ivy City Roundhouse.

Q Where is that located? A In Ivy City.

Q At Newton Avenue, Northeast? A Yes.

Q What means of transportation did he use getting to and from work? A Capital Transit—

MR. HORNING: Just a minute. I object to that, if the Court please.

THE COURT: I don't think his habit is relevant, is it?

MR. REILLY: May I approach the bench on
8 that because that is quite a material point in the case.

(Thereupon counsel approached the bench and the following proceedings were had out of the hearing of the jury:)

MR. REILLY: The question was what means of transportation her husband used in getting to and from work.

THE COURT: That means customarily.

MR. REILLY: This has got to be proved by inferences, Your Honor.

MR. HORNING: I would object to it because this witness could not possibly know of her own knowledge how, on this particular night, he came from his work and what he was customarily doing is not in issue here and is not proper.

* * * *

THE COURT: You might have asked what means of transportation in getting to and from work was available or you might have intended to ask what means did he customarily use. I think I ought to have the question completed before I rule on it.

MR. REILLY: "What means of transportation
9 did your husband use going to and from work?"

THE COURT: That means his habit and custom, doesn't it?

MR. REILLY: It couldn't mean anything else, I agree with Your Honor, on that.

THE COURT: I overrule your objection.

* * * *

BY MR. REILLY:

Q (Continuing)—What means of transportation did your husband use in going to and from work? A Capital Transit Company bus.

Q With reference to Connecticut Avenue and McKinley Streets, Northwest, where is your home located? A We are two blocks from Connecticut Avenue.

Q And again with reference to Connecticut Avenue and McKinley Street, what is the closest stop to your home of a Capital Transit bus going north on Connecticut Avenue? A That would be Connecticut Avenue and McKinley Street.

Q Can you tell us, please, the income of your husband during his lifetime? A Well, it varied depending on overtime.

Q What, if anything, did he do with his money? A Well, he always brought it home and gave it to me.

Q What did you use it for? A Well, for household expenses such as food and clothing and the note on the house.

* * * *

Q Inviting your attention to the 23rd of March, 1948, how was your husband dressed when he left for work? A He was wearing brown trousers, a blue coat and a dark gray overcoat.

* * * *

Q Will you relate, please, your husband's condition of health just immediately prior to his death? A Mr. Howard's health had always been very good.

Q Will you tell us about his habits of sobriety, please? A Well, Mr. Howard very, very rarely drank. It would have to be a very special occasion, such as friends happened to drop in and they seldom did because he was seldom home in the evening.

Q Where would he be when he would be away from work?

MR. HORNING: I object to that. She wouldn't know. She couldn't possibly know.

THE COURT: Overruled. You may answer.

BY MR. REILLY:

Q You may answer the question. A He would be at work until approximately 8 o'clock. Then he left work and he would get home around 20 minutes after 9.

Q Did your husband engage in social activities? A Hardly ever.

Q When he returned from work, what would he do? A Well, usually he had dinner. Then he helped the children with their home work, if they hadn't already gone to bed and then he would retire soon afterwards himself.

* * * *

12 Q Will you relate to the Court and the gentle-
men of the jury, please, whether intoxicating liquor
13 was kept in your home? A No, never.

* * * *

Cross Examination

BY MR. HORNING:

Q Mrs. Howard, you and your husband lived at what address on Nevada Avenue? A 5604.

Q And you said that was two blocks from Connecticut Avenue, approximately? A That is right.

Q That would be two blocks east of Connecticut Avenue? A That is correct.

Q There is a crosstown bus—on March 23, 1948, when this accident occurred, there was a crosstown bus
14 which operated from Connecticut Avenue and McKinley Street very close to your residence, was there not? A That is right.

Q You have told us that your husband customarily used Capital Transit buses, is that correct, to go to and from work? A That is right.

Q On this particular day of this accident, you don't know of your own knowledge how he got to work, do you? A Well, that was his usual means of transportation.

Q I mean from your own knowledge, you don't know?
A He always bought a bus pass.

Q No. On this day, you don't know how he got to work that morning, do you? A No, I don't.

Q And you don't know how, of your own knowledge, he came from the Ivy City terminal of Washington Terminal Company to Connecticut Avenue and McKinley Street, do you? A Well, it was usually his custom to come on the bus.

THE COURT: He means did you see him?

THE WITNESS: No, I couldn't possibly. I was home.

* * * *

15 Q Have you found anyone who accompanied your husband on any portion of his trip on the night of this accident from Washington Terminal to the place where the accident occurred? A No, I have not.

Q You were at home, were you, when you were notified of the accident? A Yes, I was.

Q Mr. Howard was in the habit, I think you said, of drinking occasionally? A Not occasionally. I said very rarely.

Q But when he did, would that be at home or socially with friends? A No, he never went out to drink.

Q He never went out with any friends? A No. He just didn't have the time. He worked long hours, as I have already told you.

16 Q But you have seen him drink? A I said very rarely, when friends happened to drop in.

Q About how frequently would it be that friends would drop in? A Maybe once or twice a year at the most.

Q And that is all that you saw him drink? A That is all.

Q When he did, would he drink gin? A I think he usually took a highball.

Q Was it gin? A Do you make highballs from gin? I am not too familiar with the mixtures myself.

Q You don't drink yourself? A No.

Q You have never touched anything to drink, have you?

A No.

Q Are you sure about that? A Positive.

Q You were informed, were you not, that your husband had, when the accident occurred, a bottle of gin in his pocket? A Yes, I was told.

Q And the following morning of March 24, 1948, did you have a telephone conversation with Sergeant
17 Waters of the Metropolitan Police? A Yes, I did.

Q In that conversation, didn't you tell the sergeant that your husband was bringing the gin for you, yourself? A No, I didn't say he was bringing it for me. I said perhaps he thought I may have liked to have it as people were coming to see the baby.

Q During the week preceding the accident, do you recall whether any friends were at your house? A Pardon?

Q During the week preceding the accident, do you recall whether any friends were at your house? A I don't recall.

Q Those two blocks which you have described from Connecticut Avenue to Nevada Avenue, are those two rather long blocks? A One is, the one from Connecticut Avenue to Chevy Chase Parkway is a rather long block. The other one is about average.

Q Is there a bus stop at Nevada Avenue and McKinley Street? A Yes, there is.

Q And how far was it from that bus stop to where you and Mr. Howard were living? A Not very far.

I couldn't tell you the exact distance, I imagine
18 about 150 feet, I would say.

Q It was within the first block, say? A Yes. Our house is the first house on Nevada Avenue.

Q In other words, that bus stop was very near to your house? A Very close, yes.

* * * *

Redirect Examination

BY MR. REILLY:

* * * *

19 Q Are you familiar with the schedule on the crosstown bus going east on McKinley Street from Connecticut Avenue? A Yes. I see them going by all the time.

Q Can you tell us now how frequently they run at approximately 9:30 at night on week days? A Twenty minutes or more. They are slow at night.

* * * *

21 *Molly Gates,*

called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. REILLY:

22 Q Mrs. Gates, will you give us your full name, please? A Molly Gates.

Q Where do you live, Mrs. Gates? And will you speak up so all of us can hear you? A 5814 Thirty-second Street, Northwest.

Q Where are you employed? A Frank R. Jelleff's, Silver Spring.

Q Silver Spring, Maryland? A Silver Spring, Maryland.

Q Mrs. Gates, inviting your attention to the night of March 23, 1948, at or about 9:30 p.m., were you on a bus at Connecticut Avenue and McKinley Street, Northwest? A Yes, sir.

Q What were you about to do? What did you do?—Let's put it that way. Did you witness the death of Mr. Howard? A I did.

Q What was the condition of the weather at that time? A It was raining.

Q Do you recall whether people got off of the bus at Connecticut Avenue and McKinley Street from both the front and the rear doors? A Yes, they did.

Q Where were you seated on that bus, Mrs. Gates?

A I was on the left-hand side of the bus, about
23 two or three seats from the rear door, center door.

Q Forward of the rear door? A That is right.

Q As you got off the bus, did you notice any activity—did you notice anyone get off behind you? A As I got up to get off the bus, coming to the back, there were some people from the back of the bus came toward the door.

Q Did you get off before that party that you saw in the rear of the bus? A Yes.

Q As you got off of the bus, Mrs. Gates, did you see anyone there preparing to get on the bus? A No, sir.

Q Was anyone at all standing at the rear of the bus as you got off? A No, sir.

Q Will you relate to the Court and the ladies and gentlemen of the jury, please, what happened immediately thereafter? A As I got off the bus, I took one long step to get onto the curb and then I had taken probably two or three steps when I looked back and there was a man caught in the door of the bus. His face was toward the bus. His back was toward me. He was clutching the door of the bus with his right hand.

24 Q What then transpired, Mrs. Gates? A The bus started out slowly and, as it did so, he seemed to be carried along for perhaps an instant and then he started to slide down and, as he slid down, I screamed, and just about that time—he had by then gotten to the ground and the back right wheel of the bus went over him.

Q Did you notice how this man was dressed? A No, I could not say.

Q Did you notice what part of his body or clothes were caught in the door? A I couldn't see.

Q Did you see him make any motion with his hands?

A Yes, he was pulling at the door with his right hand.

Q Can you tell us in which direction he was facing?

A He was facing up against the bus door.

Q Was he at right angles to the door?

MR. HORNING: I object to this, if the Court please.

THE COURT: It does sound rather leading.

BY MR. REILLY:

Q I agree with you, Your Honor.

Will you give us the exact position of the decedent prior to the tragedy? What was he doing with his hands? A When I looked back, his right hand was pulling at the center of the door. I couldn't see his left hand at all.

The left part of his body was up against the door.

25 Q By the left part of his body, do you mean the front or the rear of his body? A The front part of his body.

Q When you were on that bus, where did you board it, please? A About Porter Street.

Q Do you normally get off at Connecticut and McKinley Street? A Yes, sir.

Q How crowded was the bus? A There was no one standing.

Q And do you recall the condition of the windows on the bus? Were they misty or were they clear, if you know? A I couldn't say.

Q How far did the bus go before it stopped? A About ten feet.

Q And, as the bus came to Connecticut Avenue and McKinley Street, for the purpose of discharging passengers, how far from the curb was the bus, if you can tell us? A Between two and three feet.

Q And could you step from the rear door to the curb? A I did.

Q Could you with ease? A No. I had to take one long step.

Q Can you tell us the position of the front door
26 with relation to the curb? A No, sir.

* * * *

Q Mrs. Gates, just one or two more questions.

You spoke about, as you were about to get off the bus, that you saw some activity in the rear. Can you tell, please, if they were men or women in the rear?

27 A Some people alighted from the rear of the bus when I got off, but there was one man coming toward the door in the back of me.

Q Can you recall how this man was dressed? A No, I don't.

MR. REILLY: That is all.

Cross Examination

BY MR. HORNING:

Q Mrs. Gates, I believe you said you boarded the bus at Porter Street, Northwest, and Connecticut Avenue. A Yes, or thereabouts.

Q I am sorry? A I said, yes, or thereabouts. I had a place of business around there at that time.

Q You don't know now or can't recall now which street it was? A I would say it was Porter.

Q You would say it was Porter? A Yes.

Q That is your present best recollection? A Yes.

Q But you are not certain of that? A I am not positive, no.

Q Do you recall between Porter Street and McKinley Street, where the accident occurred, the bus made
28 several stops? A Yes, sir.

Q Do you recall people alighting from the rear door of those stops? A I didn't pay any attention.

THE COURT: Keep your voice up, Mrs. Gates.

THE WITNESS: I didn't pay any attention.

BY MR. HORNING:

Q Up until the time of the accident, as you observed it, had the bus been operated normally and as usual, without anything to attract your attention to its operation?

A Yes, sir.

Q Then, when you got to McKinley Street, I think you said, you got up and started to leave the bus; is that correct? A Yes, sir.

Q You had been seated where in the bus? A On the left-hand side of the bus, about two or three seats from the rear entrance.

Q You were then forward of the rear entrance? A Toward the front, yes, sir.

Q At that stop at Connecticut and McKinley, did several people precede you out of the rear door? A Yes, sir.

Q And you noticed nothing unusual about the
29 operation of the rear door as those people were getting out at that point; did you? A No, sir.

Q And, subsequently, you got out of that same rear door? A Yes, sir.

Q And you noticed nothing unusual about the door and its operation when you got out? A No, sir.

Q As far as you could see, when you left the rear door of the bus, it was operating normally and naturally. A Yes, sir.

Q The door didn't close on you or catch you or any part of you; did it? A No, sir.

Q And to your observation, from the people who preceded you from the bus, the bus door did not catch the clothes of any of those persons; did it? A Not to my knowledge; no, sir.

Q Are you positive that you saw, as you started to get off of the bus, a man in the rear of the bus? A Yes, sir. A man got up from the left-hand—I believe from the parallel seat, and came toward the door.

Q You are positive about that? A I am positive.
30

Q You observed that man, did you? A I observed him to the extent that I would say he had on nondescript clothing. I wouldn't say he had on a businessman's clothes.

Q By nondescript can you tell us what you mean about his clothing? A Nothing that would attract one to remember.

Q You couldn't describe whether or not he had an overcoat on? A He had a coat on, but I couldn't say that it was an overcoat.

Q Do you remember the color of his coat? A It could have been—

THE COURT: Your best recollection.

THE WITNESS: Yes. I can't say for sure.

BY MR. HORNING:

Q Did he have a hat on? A Yes, sir.

Q What was the color of the hat? A That I couldn't say.

Q Was he carrying anything? A I don't recall.

Q You looked at him?

* * * *

31 Q You looked at him? A I looked at him but I had no interest in what people were carrying.

Q Can you tell us whether or not you observed him carrying anything? A No, sir.

Q Are you positive now that the gentleman or the man that you say you saw was two or three seats back from you and walked toward the door? A He possibly was on the seat beyond the parallel seat. I know a man came from the left-hand side of the back of the bus toward the door.

Q That is your present recollection, isn't it? A That is the way I feel, yes, sir.

Q When you testified at the Coroner's inquest in this

same matter, you were not as positive about it then as you are now, were you?

* * *

32 THE WITNESS: I am telling it as I remember it. I was probably quite upset at that particular time, because I had never had anything like that happen to me before.

BY MR. HORNING:

Q Has anything occurred since that time, when you testified under oath at the Coroner's inquest, to the present time, that has made your recollection more positive than it was at that time? A No, sir.

Q And usually your recollection would be fresher shortly after the occurrence of an event than it would be three years later; isn't that right? A No, sir.

Q You think your memory is just as good three years afterwards as it was the day after the accident? A I think you can remember something when you are calm and collected more so than when you are excited.

Q Were you excited at the time of your testimony before the Coroner's inquest? A I probably was.

Q No. Were you? Not probably. Were you? A Yes, sir.

Q And is that the reason you were not as positive in your recollection then about this as you are now? Is that correct? A Yes, sir.

33 Q At the Coroner's inquest, you testified, did you not, and I am reading from page 12 of the record,

"When I got up to leave the bus, I was under the impression that a man got up from the back of the bus on the same side that I was on and crossed over."

Was that your testimony? A "Crossed over"; that is right, yes, sir.

Q First of all, in your testimony at the Coroner's inquest, you were merely under the impression that a man

had gotten up and crossed over; isn't that correct? A Crossed over to the door; yes, sir.

Q You didn't say to the door at any time in your testimony, did you? A I don't recall.

Q Repeating the rest of your answer:

"He crossed over. I didn't see anybody get off the bus behind me."

Is that correct? A I couldn't—

Q Did you see anybody get off the bus behind you?

A No, sir.

Q You have told us just now that the man was on the left-hand side of the bus, seated approximately
34 two seats behind you, or on the parallel seat; is that right? A On the parralel seat or probably the seat back of that seat.

Q What? A On the parallel seat or probably the seat back of the parallel seat.

Q Which parallel seat are you referring to? A Well, I believe there is a parallel seat right back of the door on each side of the bus, if I remember right.

Q Back of the center doors? A Yes.

Q Aren't you mistaken about that? A I could be. I really don't know.

Q Your present recollection is that this man was seated very near the rear doors; is that right? A He was back of the rear door.

Q How far back of the rear door? A Possibly one seat.

Q And that is as far as he was? A Well, I am not positive.

Q How tall was this man? A I couldn't say.

Q How much did he weigh? A I couldn't say.

Q How close were you to him? Suppose you
35 indicate the distance between you and me, and stop me when I come sufficiently near. A About like that (indicating), I would say.

Q About this far? A Yes, sir.

Q He was facing you? A He was coming toward the door and I was going toward the door.

Q Then, the two of you were approaching each other head-on? A That is right.

Q Can you tell us now whether he had anything in his hand? A No, sir.

Q And you can't describe his clothing? A Other than that they were gray, brownish; nondescript clothing.

Q Do you recall, on the day following this occurrence, your giving a statement to the police? A Yes, sir.

Q Do you recall telling the police officer this:

"When I got up to leave the bus, a man got up from the right-hand side rear and crossed over to the left"?

Is that what you told the officers at that time?

36 A I don't believe so. He was on the left-hand side of the bus.

Q And, specifically, didn't you tell the police officers that all you saw was the man on the rear of the bus get up from the right-hand side and cross over to the left-hand side of the bus? A No.

Q Let me show you a piece of paper. Is that your signature on that paper. A Yes, sir.

Q And do you recall signing this statement at the headquarters of the AIU office, meaning accident-investigation unit office, on March 24, 1948, at 10:05 a.m., and giving it to E. R. Waters? A I was there the next day.

Q Look at that first sentence:

"As I recall it, when I got up to leave the bus a man got up from the right-hand siderear and crossed over to the left. I didn't see him alight from the bus."

A If that is what I said, which I assume I did, it isn't what I meant.

Q You signed it, didn't you? A Yes, sir.

37 Q And, after Officer Waters had typed this up, you read it before you signed it; didn't you? A I don't recall.

Q You are a business lady? A I am, but I didn't think it would be so important. I don't recall whether I read it or not.

Q You are not accustomed to signing papers without reading them, for the police, are you? A No.

Q You were endeavoring at that time, were you not, to give the police officers your best recollection? A Yes, sir.

Q Of what you saw? A Yes, sir.

Q Isn't your recollection refreshed by this statement that you signed, that you didn't see any man walking toward the door and near the door, but, on the contrary, all you saw was a man get up from the right rear side of the bus, at the rear of the bus, and cross over to the left side of the bus in the rear? A No, sir.

Q In any event, you didn't see anybody alight from that bus after you? Did you? A No, sir.

Q And if a man was coming toward the door and as close to you as I am to you and had had a
38 big package in his hand, you would have seen it; wouldn't you?

* * * *

THE WITNESS: Not necessarily, no, sir.

* * * *

Q Although he was facing you and just this distance separating you, if he had a big brown package in his hand, wouldn't you have seen it? A If I did, it didn't mean anything to me. I wasn't interested in the man.

Q The weather was bad that night, wasn't it, and it was raining that night? A Yes, sir.

Q And, when you stepped off the bus, I think you said, you had to take a rather long step to get from the rear door of the bus onto the curb. A That is right.

Q The bus was then at somewhat of an angle toward the east curb of Connecticut Avenue; is that correct? A Yes, sir.

Q And did you hear the bus door close behind you?
A I don't recall.

Q As far as you know, you were the last person to get off of that bus; weren't you? A Yes.

39 Q And you then took some four or five steps away from the rear door of the bus before anything attracted your attention; isn't that right? A A few steps.

Q How many steps did you take? A Three or four.

Q With reference to the bus, where were you when your attention was attracted to the bus or something else? A I hadn't reached the front of the bus yet.

Q Were you in close proximity to the front of the bus? A Yes, sir.

Q Had enough time elapsed for you to get off at the rear door of the bus, as you have told us, step over onto the pavement,—Is that correct? A Yes, sir.

Q —and walk in a northerly direction toward the corner of Connecticut and McKinley, and be approximately at the front door of the bus, before anything attracted your attention? Is that correct?

MR. REILLY: I object to "approximately at the front door"; it hasn't been testified to.

THE COURT: She said she had not reached the front door.

THE WITNESS: I had not reached the front door.

BY MR. HORNING:

40 Q I may be in error about that. Were you in the approximate location of the front door of the bus? A I was about one or two windows back.

Q From the front door of the bus? A Yes, sir.

Q At that location, there was a curb on which you stepped when you got off of the bus; is that correct, Mrs. Gates? A Yes, sir.

Q And then there is a sort of graveled parking area in which there are trees on that side of the street before you could step onto the pavement? A I am not sure.

Q You don't recall that graveled area? A No, sir.

Q But you were walking on the pavement and had gotten to a point about the second window back? A I was walking toward McKinley. I don't know whether it was on the pavement or gravel.

Q You wouldn't walk on the gravel, would you? A I don't know whether I would or not. If it was walkable—

Q You don't have any recollection now? A I don't remember what I was walking on. I was walking toward McKinley Street.

41 Q And when you looked back, I believe you said, you saw a man facing the rear door of the bus; is that correct? A Yes, sir.

Q Let me see if I get your position. Suppose this rail— Can you see from there? A Yes, sir.

Q —is the bus headed north? Was he in a position like this (indicating), facing the bus? A No. He wasn't flat against the bus; his left side was more—

Q His left side— A —was more in toward the bus.

Q Was his left side like this (indicating)? A No; at an angle.

Q With his back— A —toward the pavement.

Q Like that (indicating)? A Approximately.

Q About on a 45-degree angle to the door of the bus? A To the best of my knowledge.

Q That is your present recollection? A I think so.

Q And was he facing toward the door of the bus? A Yes, sir.

42 Q His left side and shoulder, then, were not up against the door of the bus; were they? A I couldn't say.

Q Pardon? A I couldn't say.

Q Well, when in this position I have just now indicated, at a 45-degree angle, his back would not be to you, would it? A Part of his back would, yes, sir.

Q What? A Part of his back would, yes, sir.

Q Are you positive that any portion of him was up against the bus? A Yes, sir.

Q In this statement which you gave to Sergeant Waters, you were not sure about it; were you? A He appeared to be up against the bus.

Q He appeared to be up against the bus, but you weren't sure that he was up against the bus at all, were you? A Yes, I am, to the extent that he was pulling at the bus door with his right hand.

Q Let's get one thing at a time, please, Mrs. Gates. Is it that he appeared to you to be up against the bus door or did you actually see him against the bus? A The man was against the bus.

Q What portion of him was against the bus?
43 A The right—I mean the front left side of him was against the bus.

Q I am sorry; you dropped your voice and I couldn't hear you. What portion of him was against the bus? A The left front side of him.

Q What is the left side that was against— A No; not his side; the left front part of his body.

Q What do you mean by "the left front part of his body"? Do you mean this part (indicating) down the chest? A Yes, sir.

Q And down his front— A Yes, sir.

Q —that was against the bus? A Yes, sir.

Q And not his side or his shoulder? A The left side of him was against the bus.

Q You just told me the left front was against the bus. A Well, you have a right side and a left side. I say the left side of his body was against the bus.

Q Was the front of him against the bus? A Yes, sir.

Q What part of the bus was that against? A The door.

Q Did you use advisedly the words "appeared to be

44 against the bus"? Do you draw a distinction between "appeared" and what you saw? A I could have used that word.

Q By that, when you used the word "appeared", what did you mean? A I mean he was up against the bus.

Q In your testimony at the Coroner's inquest, reading from page 13, you said:

"His left part of him appeared to be against the door at this time."

Were you doubtful as to whether or not he was against the door? A No; he was against the door.

Q You saw him in this position at about, you said, a 45-degree angle, with part of his front up against the door; is that right? A Yes, sir.

Q And you didn't see any package in his hand at that time, did you? A I only saw his right hand, and it was clutching the door.

Q My question was: You saw no package? A No, sir.

Q In his hand at that time? A No, sir.

45 Q And you saw his right hand doing what? A Pulling at the rubber part of the door, the little rubber strips that go up and down the door.

Q Are you sure about that? A He was pulling at the door.

Q Isn't that better, "pulling at the door"? You have never before told anyone you saw him pulling at any rubber strips, have you? A He was pulling at the center of the door.

Q You saw his hand going across the door, didn't you, his right hand? A He was pulling at the door.

Q Didn't you see it going across the door, like this (indicating)? A No, he was pulling at the door.

Q And you say you didn't see his left hand at all? A Not that I recall.

Q Please refresh your recollection. A I am trying to.

Q And recall if you didn't see also his left hand doing the same thing. A I don't believe I did.

Q You are not positive as to what his hand was doing when you saw it moving, are you? A He was pulling at the door.

Q Do you recall in this same statement telling
46 Sergeant Waters the day after the accident:

"His right hand and possibly his left was making motions across the door"?

Did you tell that to the sergeant? A I probably did.

Q Wasn't that the truth, when you told him that? A As I saw it, I suppose so.

Q Isn't your recollection refreshed that with both hands he was moving across the door? A No, sir.

Q In your testimony before the Coroner's inquest, you weren't positive about what you saw his hands doing, were you? A I don't remember what testimony I gave at the Coroner's inquest. I am just trying to remember it as I recall it now.

Q At page 13, as part of your answer you said:

"I am not sure. It may have been like this (indicating) but I am not positive, but this hand"—indicating the right hand—"was definitely going like that as the bus started off slowly. In all fairness to the bus driver, may I say this, as I see fit."

Do you remember that? A Yes; I remember saying that, that I remembered just one hand.

47 Q With reference to this statement which you gave on the morning after, wherein you told the sergeant:

"Possibly also his left hand was making motions across the door", isn't that your recollection now? A No, sir.

Q About whether or not you saw his left hand? A No, sir.

Q How long was the man in that position before the bus started? A Before it started?

Q Yes. A Well, I will say just a second that I saw him, just a very short time.

Q Did it afford you an opportunity to cry out? A I don't believe I cried out until the bus had started out and he started to slide down. He seemed to be carried along with the bus.

Q How tall was the man who was standing there? A He wasn't a tall man.

Q He wasn't as tall as I am, was he? A I couldn't say, but he wasn't a tall man.

Q You don't describe me as a tall man; do you? A No, sir.

Q With reference to my height, about how tall was he? A He could have been about the same height that you are.

Q And did you notice approximately how heavy he was? A No.

Q He was there for an appreciable time, in any event, before the bus started up; is that correct? A I only saw him just a very short time.

Q During that time, did he make any outcry? A No, sir.

Q Did he change in any way his position from this 45-degree angle that you have told us about? A No, sir. As the bus started moving, he started moving down on his left side.

Q Did he move back? Did you see him make any effort to move back, away from the door? A He appeared to be trying to get away from the door.

Q No; I asked you, did you see him move back, step back? A No.

Q And then the bus started; is that right? A Yes, sir.

Q And the bus started slowly; did it not? A Yes, sir.

Q When the bus started, the wheel of the bus—that is, the right rear wheel of the bus, was very near
49 to this man; wasn't it? A Not when the bus started; no. He was still at the door when the bus started.

Q The right rear wheel of the bus is very near the door; is it not? A That is right.

Q How close is it to the door? A Possibly three feet.

Q Didn't you testify in the hearing before the Coroner's inquest that that wheel was perhaps twelve inches, maybe a little more, from him when he started to go down? A He started to go down as the bus started off, and, by the time he got down, the wheel could have been twelve inches from his head.

Q Was he in the same position that you have indicated to us when he slumped down? A He went down on his left side in the same position you are going down.

Q Just like this (indicating)? A I believe so.

Q And, as far as you could see, he was in the same position when he was on the ground? A I couldn't say; I didn't look at him after he hit the ground.

Q You saw the bus run over his shoulder;
50 didn't you? A No, no. I just knew that it was going to, when I screamed.

Q His shoulder was nearer to the side of the bus than was his head; wasn't it? A I would say yes.

Q And the bus continued in its same course; did it not? A Yes, sir.

Q And his left leg was nearer to the wheel of the bus? A I can't say.

Q —than was his head, if he was in this position? A I can't say, because I didn't look. When I realized he was going to be run over, I didn't look at him then; I just screamed.

Q Do you recall testifying at the Coroner's inquest, on page 13:

"He slid in the same position that he was at the door, with his left part of him going down, and possibly his left leg and foot went under him. I am not positive about that, but he landed on his left side." Is that right? A I believe so.

Q Didn't you also say,

"At the same instance, naturally, the bus went over the man's head and possibly his left shoulder"?

51 A That is the impression I got, I believe.

Q And it went over his left shoulder and he was in this position, and it would have had to go over his left leg; wouldn't it? A No, not necessarily. It just went over the top of his body, if I recall right.

Q As you now recall it, the wheel went over his shoulder as well as his head; isn't that correct?

* * * *

THE WITNESS: I am not positive.

BY MR. HORNING:

Q Your best recollection. A From the way he went down, I assume that is the part of his body that the bus ran over.

Q The bus didn't go, according to your recollection, more than two feet? A It had to go more than that.

Q What is your present recollection of how far the bus went? A Around ten feet, I would say.

52 Q Around ten feet? Might it have been more than that? A Ten feet or more. I realize now that a bus could not possibly stop within two feet.

Q You testified under oath at the Coroner's inquest, didn't you,— A I was telling it to the best of my ability, as I saw it at the time.

Q You testified there that the bus did not go more than two feet, didn't you? A But I am sure it would have to go more .

Q And you testified there under oath— A I probably did, if it is there; yes, sir.

Q And you testified there he stopped quick; didn't you? A The bus driver?

Q Yes. A Yes.

Q Could you tell us what kind of clothes the man had on that you saw up against the side of the bus? A No; I can't.

Q No description of them at all? A They were non-descript. They weren't of any particular color that I can recall.

Q Did you see when he was at the rear door of the bus, in the manner which you indicated, did you see any package? A No, sir.

53 Q Did you see anything in either of his hands? A No, sir.

Q When he was in that position, were the doors of the bus closed? A They appeared to be.

Q You are not certain about that; are you? A No, sir.

Q Did you see any portion of his clothing within the doors of the bus? A No, sir.

Q Did you see any portion of his body within the doors of the bus? A No, sir.

Q I think you said the man made no sound at all. That is correct; isn't it? A I didn't hear him make a sound.

Q You were very near, weren't you, to him? A That is right.

Q If he made any outcry, you would have heard it, wouldn't you? A I feel that I would have; yes, sir.

Q Your hearing then and now is good? A Yes, sir.

Q Do you recall where the front of the bus was with reference to the bus stop sign when you got
54 off of it? A No; I don't.

Q The bus-stop sign sets back, does it not, some considerable distance from the corner, that is, on the east side? A I don't know.

Q I think you said you screamed. A Yes, sir.

Q From the position of the man at the rear doors when you saw him, the operator could not have seen him, could he? A I don't think so.

Q And wasn't that the reason you screamed, because you knew that the bus operator could not have possibly seen the man in that position? A I screamed because I knew the man was going to be run over.

Q Do you recall, at the Coroner's inquest, your testimony:

"My first idea was to pull him out, and I realized I couldn't, and I knew the driver couldn't possibly see him; so, I screamed"? A Yes, sir.

Q Is that correct? A Yes, sir.

Q And that was the reason you screamed, wasn't it, to attract the attention of the bus operator? A I feel now that I screamed because the man was
55 going to be run over.

Q And not as you felt when you testified before the Coroner's inquest? A I don't think so.

Q When the bus started off, and just immediately before this accident,—when the bus started off, it started off smoothly and slowly, did it not? A To the best of my knowledge.

Q There wasn't any jerk or sudden burst of speed or anything of that sort? A No, sir.

Q And then the man went down alongside the bus and the bus started, did he go in a forward direction any distance at all? A What do you mean, "forward"? On his face, do you mean?

Q In the direction in which the bus was moving? A No, sir; I don't think so.

Q He stayed right where he was as the bus went off; isn't that right? A Do you mean, was he carried along with the bus? Yes; he was.

Q How far? A A very short distance.

56 Q How far? A Perhaps two feet.

Q Do you recall answering that question by

"slightly" at the Coroner's inquest? A No, sir.

Q Do you recall this question being asked you and you replying to it this way, at page 18, from the record:

"When this man slid down on the bus, did he seem to be carried along with the bus at all?" And your answer was: "Slightly"? A Yes, sir.

Q What? A That is what I said, just "slightly."

Q You said, "Well, I mean yes, slightly". And by "slightly" you didn't mean any two feet, did you? A Yes.

Q You call two feet a slight distance to be carried? A Yes, sir.

Q With this right hand, wasn't the man attempting to, as you saw him, push his hand toward the front of the bus? A No, sir.

Q Do you recall this question being asked you on page 19:

"When you first saw the man, he was attempting to push his hand toward the front of the bus, and
57 he was on his feet at the time? "A Yes." Do you recall that? A He was on his feet, but he was not pushing his hand.

Q Toward the front of the bus? A No, sir. He was—

Q Was he standing in the street area, as distinguished from the gravel area? A Yes, sir.

Q Or sidewalk area? A Yes, sir.

Q And were both feet in the street? A I am not positive.

Q I want again to direct your attention to this testimony about "slightly" and "two feet", and ask you if this question was not asked you, on page 19, at the Coroner's inquest, and didn't you answer it this way:

"Q You said, I think, that there was a slight carrying of him. Can you give us the estimate in feet or inches that he was carried forward?

And your answer was:

"Well, he could have been very few inches because I am under the impression that the bus moved but about two feet before it stopped."

Do you remember that question and that answer?

58 A He was carried along, I say, approximately two feet, eighteen inches to two feet.

Q At the Coroner's inquest, you were asked to clarify what you meant by "slightly", and didn't you answer:

"Well, he could have been very few inches, because I am under the impression that the bus moved but about two feet before it stopped"? A If that is what is in the record.

Q Wasn't that the truth, at that time? A It probably is as I saw it then. I don't recall seeing it that way.

Q You were endeavoring to give at that time your best recollection of what had occurred just a day or two before; were you not? A Yes, sir.

Q And, as soon as you had screamed, did you observe what the bus did? A I don't recall.

Q Do you recall the bus stopping and the front door opening? A No, I don't.

Q Do you recall the rear door opening? A No, because, if I remember correctly, as soon as he was run over, I ran across the street to Peoples Drug Store and called for help. I didn't stay there.

59 Q And then— A I don't know what actually happened.

Q And then returned to the scene, didn't you? A After a while.

Q And do you recall any passengers immediately after this occurrence coming out that same rear door that you had come out of? A No, sir; I didn't pay any attention to that.

Q Were you there when the police officers arrived? A I don't recall.

Q Don't you recall staying there and when the police officers arrived giving your name to the police officers as a witness? A I did, but I believe they were there when I came back from the drug store. I am not positive of that, however.

Q When you returned, do you have a recollection of the decedent's being up on the curb? A I believe there was one of his feet on the curb, or the tip of one of his feet.

Q And that is your present recollection? A I think he probably was covered up when I came back, but I am not positive.

Q But you do have a recollection of at least one foot being on the curb? A I am not positive.

* * * *

60 (Photographs of the bus were marked Plaintiff's Exhibits 1 and 2 and received in evidence.)

* * * *

(Plaintiff's Exhibits 1 and 2 were shown to the jury.)

Redirect Examination

BY MR. REILLY:

Q Mrs. Gates, you were asked by Mr. Horning whether or not you were positive there was a parallel seat to the rear of the rear door of this bus. I now show you what is marked Plaintiff's Exhibit 2 and
61 ask you if you will tell the ladies and gentlemen of the jury and the Court, please, where you think that parallel seat was that you had reference to. A About here (indicating)—right back there.

* * * *

Q When you had the conversation with the police officer, will you relate what was said about right and left to you by the policeman?

MR. HORNING: If anything.

BY MR. REILLY:

62 Q If anything. A I can't recall what was said, but, whatever I said, I meant that the man was coming from the left of the bus over toward the door.

MR. REILLY: That is all, Your Honor.

THE COURT: Let me ask you a few questions, Mrs. Gates.

When you alighted from that bus on the evening in question, as I understood your testimony, you took a long step to the curb and then turned to your left, facing Chevy Chase Circle?

THE WITNESS: Going toward Chevy Chase Circle, yes.

THE COURT: And you took several steps?

THE WITNESS: Yes, sir—a few.

THE COURT: During that period of time, did you hear any noise emanating from the rear bus door?

THE WITNESS: No, sir; not to my knowledge.

THE COURT: Was it raining?

THE WITNESS: Yes, sir.

THE COURT: Did you have an umbrella?

THE WITNESS: I don't believe I did. As a rule, I travel by car. I was caught by accident that night.

THE COURT: Your best recollection is—

THE WITNESS: I don't believe I had an umbrella.

THE COURT: As you took that long step, did you look toward the city?

THE WITNESS: I don't believe I did.

63 THE COURT: Did you notice anybody to your right?

THE WITNESS: No, sir; I didn't. I didn't look to the right. I didn't notice anyone.

THE COURT: Was there anybody to your left?

THE WITNESS: Not facing me. They were all leaving, the same as I, going toward McKinley.

THE COURT: Did anyone pass you, going toward the bus?

THE WITNESS: No, sir.

THE COURT: Did you pass anyone as you alighted from the bus;—

THE WITNESS: No, sir.

THE COURT: —took the long step and took several steps toward Chevy Chase Circle?

THE WITNESS: No; I didn't. Everybody was ahead of me.

THE COURT: What time of night was this?

THE WITNESS: Well, I closed at 9 o'clock. It was about 9:25, 9:30.

THE COURT: That is all.

Do you have anything further, gentlemen?

* * * *

64

Edward F. Boucher

* * * *

Direct Examination

BY MR. REILLY:

Q Mr. Boucher, will you please give us your full name? A Edward F. Boucher.

Q Where do you live, Mr. Boucher? A 311 K Street, Northeast.

Q What is your occupation, sir? A General foreman locomotive repairs, Ivy City Shop, Washington Terminal Company.

Q Did you know the deceased, Edward T. Howard, in his lifetime? A Yes, sir.

Q How long had you known him? A Well, I gave him his job as an apprentice boy in 1923.

Q You had known him then 25 years. During that time, had he worked under your supervision? A Yes, sir.

Q What was the nature of his duties? A Making repairs on locomotives, both steam, electric and Diesels.

Q What, if any, opportunity did you have to
65 observe him in his work? A Oh, many many times a day during his tour of duty.

Q Would you relate to the Court and the ladies and gentlemen of the jury, please, the character of man he was as to industry and sobriety and attendance to duty and work? A How is that?

Q Will you relate to the Court and the ladies and gentlemen of the jury his habits relative to sobriety, industry and attendance at work? A A very good loyal employee; a very good worker, a good mechanic.

Q What were his habits of sobriety? A As far as I know, they were perfect.

Q What were his hours of duty, Mr. Boucher? A Well, just prior to him getting killed, it was 9 a. m. to 5 p. m.

Q Will you relate to the Court and jury, please, his overtime schedule, if you know? A Well, he was assigned as a specialist on inspection, testing repairs to steam generators at that particular time and it was very often necessary to hold him overtime to work on Southern Railway Diesels due to the fact that they don't have any regular men assigned to those engines.

* * * *

67 Q Mr. Boucher, did you ever see Mr. Howard drink intoxicating liquor? A No, sir, I never did.

Q And you generally observed him from what hours, sir? A Yes, we observe all employees very close.

* * * *

BY MR. HORNING:

Q Mr. Boucher, did you ever visit Mr. Howard socially? A No, sir.

Q You never went out with him? A No, sir. I have met him out, though, but I never went with him.

Q You never visited at his home? A No, sir.

Q And your statement about his sobriety was predicated upon what you observed of him on the job? A So far as I know of him, yes, sir.

Q On the job? A On the job, or any time I met him on the outside but that was very seldom.

Q You say you keep close track of your employees, close tab on them? A Well, we keep close observation on them, yes, sir, particularly when they are working. We walk around and go through the shop practically all day long.

Q Of course, you wouldn't let a man work if he were tight on the job, would you? A No, sir.

Q But you are not concerned with what he does after hours, are you? A No, sir. That is none of our affairs. I don't know anything about what he does.

Q That is right, and right across the street from your Ivy City Shop is a liquor store, isn't there? A Yes, sir.

Q That is called "Katz' Store"? A I don't know the fellow's name. I have never been in it in my life.

Q You have seen your employees go in it, haven't you? A No, sir.

Q You have never seen one of your employees go into Katz' Liquor Store? A No, sir.

Q Right across the street from the shop? A No, sir, I have never seen them go in there. No doubt they go in there but I have never seen them.

Q After they leave your premises, you are not interested? A No. It isn't my business what they do or where they go, only so they do the job.

Q You can't tell that you have seen Mr. Howard as soon as he got out of work go right into the liquor store? A No, sir.

Q You have never seen any of them go in? A No, sir.

* * * *

72

Leo B. Denton

* * * *

Direct Examination

BY MR. REILLY:

Q Mr. Denton, may we have your full name and address, please? A Leo B. Denton, 4719 Seventeenth Street, North, Arlington, Virginia.

Q And your occupation? A Gang foreman.

Q Where? A Washington Terminal Company.

Q Any particular branch, or shop? A Diesel engines.

Q Where is your place of employment located? A The Ivy City Shop, Washington Terminal.

Q Did you know Mr. Edward T. Howard in his lifetime? A Yes, sir.

73 Q How long had you known him prior to his death? A Oh, about 10 or 15 years.

Q Under what circumstances did you know him, sir? A I worked with him and I was also foreman from 4 to 12 and he occasionally worked overtime under me.

Q Will you indicate to the Court and the ladies and gentlemen of the jury, his habits in industry and sobriety? A Well, he was a good workman, a steady workman. That is about all I know about him.

Q Can you tell us about his habits of sobriety? A He was all right, so far as I know.

Q Inviting your attention, please, to the 23rd day of March, 1948, can you tell the Court and ladies and gentlemen of the jury what time he left work that day?

A Was that the day that he was killed?

Q Yes, sir. A I signed his time card about five minutes of 8 p. m.

Q Did you see him at that time? A Certainly.

Q How was he dressed at that time, sir? A I don't remember exactly what he had on, his regular working clothes.

Q What do they consist of? A A suit of dungarees and a jacket and shirt, cap.

* * * *

74 Q At the time that you saw him at five minutes of 8, what was his condition as to sobriety? A He was all right.

Q Did you notice anything at all about intoxication at that time? A No, sir.

Q During the entire time he was employed there, did you ever see him intoxicated? A No, sir.

Q Did you ever see him take a drink while working? A No, sir.

* * * *

75

Cross Examination

BY MR. HORNING:

Q Were you on social terms with Mr. Howard? A I was on friendly terms, if that is what you mean.

Q I mean did you visit his house? A No, sir.

Q Did he visit your house? A No, sir.

Q When you told us just now about his sobriety, you meant on the job, didn't you? A That is right.

Q You don't know anything about what he did when he left the job? A No, sir.

Q Or whether or not he did any drinking away from the job? A No, sir.

Q Right across the street, there is a liquor store, isn't there? A Across from the shop, yes, sir.

Q Katz' Liquor Store? A I don't know what the name of it is. I know it is over there.

Q Employees, mechanics, out there at your shop go over to Katz' and stop there when they finish
76 their work, wouldn't they? A I don't know.

Q You never saw anybody go there? A No, sir.

Q Any of your men go over to the liquor store? A No, sir.

Q Even to get any checks cashed? A I wouldn't say. I never saw them. Whether they did or not, I don't know.

Q You never paid any attention to what any of your men did just as soon as their work was over? A That is right.

Q What they did on their own time was their own business? A Yes, sir.

* * *

77 Q Did you say that you signed Mr. Howard's time card on the night of March 23? A Yes, sir.

Q And your best present recollection is that it was about five minutes of 8? A About five minutes of 8, yes, sir.

Q It might have been a little bit earlier? A It wouldn't have been more than two or three minutes.

Q You make no check with the watch? A Not to the actual minute.

Q You made no check with your watch? A We have a clock right there in the roundhouse. I never sign a time card until five or six minutes from relieving time.

Q Do you recall whether or not you checked with the clock on this night? A I know I did. I always did.

Q I mean your testimony is that you feel that you did because you always did, is that right? A That is right. I always check the time card.

78 Q But you have no positive recollection of checking on this occasion? A Well, it is a form of habit.

Q You don't recall this particular night, do you? A Since it is the night that Mr. Howard was killed, I do remember it very clearly.

Q Do you remember the weather conditions? A Yes, sir.

Q You recall that he was in his work clothes? A Yes, sir.

Q Do you recall that because of force of habit that he would always be in his work clothes when he brought his ticket to you when he signed off before 8? A Yes. They are always in their work clothes. We don't sign them unless they are.

* * * *

Redirect Examination

Q What is that five or six minutes utilized for? A We have to give them that much time in order to turn in their time cards and in order to be relieved at the time their time expires.

Q And to wash up? A No.

79 Q When do they wash up? A After the time for relieving time.

Q They wash up on their own time? A Yes, sir.

Q Is that for changing clothes, too? A During the wash-up time, yes, sir. They don't change clothes until after they are relieved.

* * * *

Rose Mary Howard

* * * *

Direct Examination

BY MR. REILLY:

Q Rose Mary, you speak up so everyone can hear you and give us your full name. A Rose Mary Evelyn Patricia Howard.

* * * *

Q And the daughter of Mr. Howard who was
80 killed on March 23, 1948? A Yes.

Q Where do you go to school? A The Academy of the Holy Cross.

Q What grade are you in? A Freshman.

Q By that, you mean the first year of high school?
A Yes.

Q Will you relate, please, what your father did around the house after work hours, what little duties would he do around the house? A I don't know what you mean.

Q Would he cut the lawn? A Yes.

Q Does that help you any? What else did he do besides that? Would he help your mother? A Yes.

Q Did you ever see your father under the influence of intoxicating liquor? A No.

Q What, if any, help would he give you children with your studies? A He helped us with our home work when we didn't understand.

* * * *

Cross Examination

BY MR. HORNING:

Q Rose Mary, did you ever see your father take a drink when his friends were home with you? A No. We hardly ever had company.

Q When company would come, you would go upstairs to bed, wouldn't you? A They never came at night.

Q Nobody ever came at night? A No.

Q You were only ten years old when your father died, weren't you? A Eleven.

Q If any company came, it would be during the day, is that right? A Well, he worked mostly.

* * * *

John Joseph Howard,

* * * *

Direct Examination

BY MR. REILLY:

82 Q John, may we have your full name? A John Joseph Howard.

Q You are the son of Mrs. Howard who sits on my right? A Yes, sir.

Q And the son of Mr. Howard who was killed on March 23, 1948? A Yes, sir.

Q Where do you go to school? A Gonzaga High School.

Q What year? A Freshman.

Q How old are you? A Fifteen.

Q John, did you ever see your father under the influence of intoxicating liquor at any time? A No, sir.

Q What did your father do around the house after work, if you know? A He would come home and he would help around the house. He would help my mother and he would help me do my home work and, after that, he usually went to bed.

* * * *

Cross Examination

BY MR. HORNING:

83 Q John, did you ever see your father take a drink at all? A No, sir.

Q Did you ever have any company at your house?

A Did I ever have any company?

Q No, did your father and mother have any company?

A Yes.

Q Did you ever see them have anything at all of a refreshment nature? A No, sir.

Q You didn't know what they had, did you? A Yes, sir.

Q What was it? A Pardon?

Q What was it? A They never had intoxicating liquor in the house.

Q I asked you what was it that they had? A Well, they would have food.

Q That is all; nothing to drink? A Not in the way of liquor or anything.

Q How frequently have you had company at the house? A Oh, maybe four or five times a year.

Q In the day time or night? A Usually night time.

Q What? A Usually the night time.

84 Q Usually in the night time and you would stay up, would you? A No, sir.

Q You would go to bed? A Well, yes, I used to go—

Q What? A I used to go to bed.

* * * *

Emmett R. Waters,

* * * *

Direct Examination

BY MR. REILLY:

Q Mr. Waters, may we have your full name? A Emmett R. Waters.

Q Where do you live, sir? A 5815 Chillum Gate Road, Chillum, Maryland.

Q What is your occupation, Mr. Waters? A I am a precinct detective assigned to the Homicide Squad.

Q Of the Metropolitan Police Department,
85 Washington, D. C.? A The Metropolitan Police
Department, Washington, D. C.

Q Inviting your attention to March 23, 1948, did you
have an occasion to go to Connecticut Avenue and McKin-
ley Street, Northwest. A Yes, sir.

Q At what time? A I arrived there in the neighbor-
hood of 10 p.m.

Q Did there come a time when you observed the re-
mains of Mr. Edward T. Howard? A His remains had
been removed upon my arrival.

Q Did you have an occasion to determine how he was
dressed? A I can't describe his clothing exactly but he
had on a suit, shoes—I don't recall the hat, and an over-
coat.

Q Can you recall the color of the overcoat? A As I
recall, it was a gray checked material.

Q When you examined him, did you find anything in
his pocket? A We found a broken bottle, a whiskey
bottle.

Q Can you tell us whether or not your examination
disclosed whether or not that bottle had been opened? A
The neck of the bottle had not been broken and the seal
upon it had not been broken, indicating that it had never
been opened.

* * * *

86

Cross Examination

BY MR. HORNING:

Q Sergeant, where was the bottle when you found it?

A It was in his clothing that had been removed from
him at the District Morgue.

* * * *

Q Was it in the coat pocket? A It was in the coat
pocket.

Q Of the overcoat? A Yes, sir.

Q Or the inside coat? A The overcoat.

* * * *

Q You said there was a whiskey bottle there? A It was a liquor bottle. I wouldn't say now whether it was whiskey or gin.

Q Do you recall that it was Gordon's Gin? A If I may refer to my notes—

Q Yes, will you refer to your notes? A I believe you have them.

Q Yes, sir (handing document to the witness).

87 A That was Gordon's Gin; one-sixteenth gallon.

* * * *

Q A half pint of Gordon's Gin. The bottle itself, I believe you said, was broken? A Yes, sir.

Q The revenue seal, however, around the cap of it was intact? A Yes, sir.

Q And that would indicate to you that that bottle had not been opened at the time of the accident, is that correct, Sergeant? A That is correct.

* * * *

89

Frank Di Meglio

* * * *

Direct Examination

BY MR. REILLY:

Q Mr. Di Meglio, will you give us your full name, please, sir? A Frank Di Meglio.

Q Where do you live? A 10,117 Garden Avenue, Silver Spring, Maryland.

Q Where are you employed, sir? A Washington Terminal.

Q At the Ivy City Shop? A Ivy City Shop, yes, sir.

Q How long have you been employed there? A Twenty-three years.

Q Were you so employed on the 21st day of March, 1948? A Yes, sir.

Q Did you know the deceased, Edward T. Howard?
A Yes, sir.

Q Did you see him on that day? A Yes, sir.
90 What was the last time you saw him on that
day? A Around about 4 o'clock that evening.

Q What time did you go off duty that day? A Four-
thirty.

Q Will you tell the Court and the ladies and gentle-
ment of the jury, please, of the habits and the industry
of Mr. Howard? A Well, he was a good machinist and
willing to work; a very good machinist.

Q Was he a pretty steady worker? A Yes; he was
a steady worker, yes, sir.

Q Do you know his habits of sobriety? A His habits
were good, very good habits.

Q Did you ever see him take a drink of intoxicating
liquor? A No, sir.

* * * *

Cross Examination

BY MR. HORNING:

Q Did you associate with him socially, Mr. Di Meglio?
A Yes. I worked as a machinist around him for a long
time. I was a machinist at that time and he was a ma-
chinist. We worked together on different jobs.

Q But your contacts were just on the job? A Just
on the job only.

91 Q You never went to his house? A No, sir.

Q He never came to your house? A No, sir.

Q You just knew him on working hours? A Just dur-
ing working hours, yes, sir.

Q Across the street from the shop is Katz' Liquor
Store, is that right? A Yes. That is the liquor store
across the street.

Q Did you ever see Mr. Howard go in there? A No,
sir.

Q Did you ever go in there? A No, sir.

Q Did you ever see any of your men go in there? A No, sir.

Q For any reason? A For any reason, that is right.

* * * *

92

John W. Phillips,

* * * *

Direct Examination

BY MR. REILLY:

Q May we have your full name? A John W. Phillips.

Q Where do you live, Mr. Phillips? A 1014 I, Northeast.

Q What is your occupation? A Roundhouse foreman.

Q Where? A Washington Terminal Company.

93 Q At what location? A Ivy City.

Q What are your hours of duty, sir? A 3:30 in the afternoon until 12:30 in the morning.

* * * *

Q Inviting your attention to the 23rd day of March, 1948, did you see Mr. Edward T. Howard on that day? A I did.

Q Can you tell us what time he left work on that day? A E. T. Howard came in the office where I was at shortly after 8 o'clock and give me his time card marked at 8 o'clock.

Q How was he dressed when he came in your office? A He was dressed in street clothes.

Q By that you mean he had changed from overalls? A That is right.

Q And to street clothes, and what was his condition of sobriety at that time? A A hundred percent, as far as I could see.

Q By that you mean a hundred percent sober? A That is right.

Q Did you know him very well? A Yes. I
94 have knowed him pretty well.

Q How long have you known him? A I have knowed him since before he went on the railroad.

Q How long has that been? A Well, I would say in the neighborhood—he went in the railroad in 1923—I would say I knowed him since around 1918, something of that sort.

Q What were his habits of industry and enterprise? A As far as I know of them they were all right.

Q What kind of work would he do there? A When?

Q What did he do at the Washington Terminal Company at the time of his death? A He was a machinist.

Q Did he come under your supervision? A He did after he was there the hours that I was assigned there.

Q Will you relate to the Court and the jury, please, what kind of work he did, the character of the work? A Well, he done machine work. He worked on the Diesels, Diesel engines; something like an automobile. He removed pistons and bearings, worked on boilers, that is, in the Diesels; anything of that sort that may be assigned to him.

Q As to reliability, what kind of a man was
95 he? A What do you mean by that?

Q Was he reliable? A He was.

Q Did you ever see him drink intoxicating liquor? A Never have.

* * * *

Cross Examination

BY MR. HORNING:

Q Mr. Phillips, you didn't visit him socially, did you?

A I did not.

Q And he didn't visit you socially? A He did not.

Q Your contacts with Mr. Howard were limited to your regular hours of business and duties over there at the shops, weren't they? A Well, his hours was from 9 to 5, see, and when he worked overtime, such as he did that night, he worked practically three hours that I had charge of the shop.

Q My question simply was, Mr. Phillips, that your contacts with him were limited to the business contacts?

A That is right.

Q On the job? A On the job, that is right.

Q And what he did on his own time was his
96 own business? A That is correct.

Q You didn't interfere with that and you didn't check up or endeavor to find out anything about what he did after he left the shop? A It was none of my business.

Q That is right. All you were interested in was that he did his job? A While he was there, that is right.

Q Whereabouts in the terminal was he assigned to work on the 23rd of March, 1948? A Well, he was assigned to work in the roundhouse but, on this particular night, I am pretty sure that he worked on a boiler of Southern Engine 2801.

* * * *

97 Q Your best recollection is that you saw him just a couple of moments shortly after 8 o'clock?

A I did, that is right, because I received his time card. He give it to me.

Q His time card was then signed by another gentleman, was it? A His time card was signed by the gang foreman, Denton, who has charge of the Diesel engines and he is under his jurisdiction and he is supposed to turn his time card in before leaving the property, which he did.

Q He was dressed in street clothes when you saw him?

A That is right.

Q And ready to leave the premises? A That is right.

Q When you say you never saw him take a drink, you meant you never saw him take a drink on the job?

A Well, I never saw him take a drink anywhere. I have seen him on the street but I have never visited him. I have seen him on the street but I never saw him coming from a bar room or taking a drink any place.

* * * *

98 Q Do you recall, Mr. Phillips, how he was dressed that night? A Just as I stated before, he was dressed in his street clothes to go out. I don't know what he had on. He didn't have overalls on.

Q You didn't pay any particular attention? A Not any particular attention. I know he was dressed to go out. That isn't the first time he has given me his time card. He has given it to me numerous times.

Q There was nothing unusual that night? A
99 Nothing at all.

Q Did he have any package with him when he left? A I didn't see any.

Q If he had a package with him, you would have seen it? A I would have been very apt to see it.

Q Something like a big brown package wrapped up in brown paper, you would have seen it? A I would have seen it, certainly.

* * * *

Harry Francis Yokum

* * * *

Direct Examination

BY MR. REILLY:

Q Mr. Yokum, may we have your full name, please, sir? A Harry Francis Yokum.

Q Where do you live, Mr. Yokum? A 4223 29th Street, Mt. Rainier, Maryland.

Q Where are you employed, sir? A Washington Terminal.

100 Q Ivy City? A Ivy City Roundhouse.

Q What is the nature of your occupation, sir?
A Gang foreman.

Q How long have you been at the Washington Terminal? A Over 20 years.

Q Did you know Mr. Edward T. Howard in his lifetime? A Yes, I did.

Q Did he work with you? A Yes, he worked with me and also, in later years, I was supervisor over Mr. Howard.

Q What kind of a workman was he? A A very good steady worker.

Q What were his habits of sobriety? Was he a sober man? A Yes, as far as I knew.

Q Did you ever see him drink? A I never did.

* * * *

Q Inviting your attention to March 23, 1948, which was the date of his death, did you see him on that day?

A Yes, I did.

* * * *

101 Q What time did you leave your work that day?

A Four-thirty.

Q Was he sober when you saw him? A Yes, he was.

* * * *

Cross Examination

* * * *

102 Q Your contacts with Mr. Howard were limited to the hours you worked with him? A That is right.

Q You didn't visit him socially, did you? A No, I did not.

Q And he didn't visit you socially? A No.

Q You didn't go out together with your wives and families or anything like that? A No, sir.

Q And your testimony about his sobriety is limited solely to contacts you had with him on the job during regular working hours? A That is right.

Q What he did after working hours, that was his own business? A That is right.

* * * *

103 Q Did you ever see him go across the street to Katz' Liquor Store? A No, I never did.

Q Did you ever see any of your men go over there? A No, I didn't.

Q The liquor store is right across the street from the shop entrance? A There is a liquor store over on New York Avenue.

Q And to your knowledge, none of the men there
104 in your working place ever went across the street over there? A No, sir.

Q To the liquor store? A No.

Q Not to get checks cashed or anything like that? A No, sir.

* * * *

108 *William J. P. Howard*

* * * *

Direct Examination

BY MR. REILLY:

Q Dr. Howard, will you give the Court and the jury your full name? A William J. P. Howard.

Q Where do you live? A 1331 Staples Street, Northeast.

Q What is your occupation? A Physician.

Q How long have you been a physician, Doctor? A I have been a physician since 1938, a practicing physician.

Q Has your practice always been civilian, Doctor?

A Well, I spent three years in the Navy during the war.

Q Dr. Howard, what relation if any, were you
109 to the deceased, Edward T. Howard? A He was my brother.

Q Inviting your attention to March 23, 1948, did you have occasion to go to the morgue? A Yes, I did.

Q For what purpose, Doctor? A I was called to the morgue to identify my brother's body. It was late in the evening when I went over and the keeper of the morgue took me in the morgue room and showed me several bodies and finally he came to the body of my brother. I identified him.

Q Do you recall, Dr. Howard, whether your brother at that time was dressed? A Yes, I believe he was dressed at the time. He had clothes on. He didn't have a hat on but he had a coat and suit on.

Q Will you describe that coat for us, please, Doctor?
A It was a dark color, probably a dark gray or brown, as near as I can remember.

Q Prior to the 23rd of March, 1948, can you tell us when you last saw your brother? A I saw him about a week or ten days before he died.

Q Under what circumstances? A Well, there was a new baby in the family and they were going to have a christening the following Sunday and coming home from
work—he works right close to my office for the
110 railroad shops are a short distance from the office—and after he got off from work he dropped in to see me and invited me to the christening.

Q Did you have an occasion to examine him at that time, Doctor? A Yes. I took his blood pressure and listened to his heart.

Q What was his condition of health? A I thought it was very good.

Q Who was your brother's family physician? A I was his family physician. He came to me.

Q Will you relate to the Court and the jury, please, his condition of health, we will say, a year prior? A He was never sick. The only time I ever saw him was sort of on a social call and I would check his pressure and look him over then.

Q Do you know his habits of sobriety, Doctor? A Well, he was working all the time and he would take an occasional cocktail but I would say he was quite sober.

* * * *

111

Cross Examination

BY MR. HORNING:

Q Dr. Howard, in treating your brother, you didn't maintain any records of him like you would in treating another patient, did you? A No; he would come in on sort of social calls and while he was there he would ask me to check his pressure and listen to his heart.

* * * *

Q All you did was take his blood pressure? A Yes.

Q And listen to his heart? A Yes.

* * * *

Q And you were not positive what kind of clothing he had on? A I would say it was clothing of a dark nature; brown or gray.

Q Tan of any color? A It would be brown or gray, I would say. It was dirty. He worked on the railroad and naturally it would be stained.

Q Are you talking now about the overcoat?

114 A I am talking about the topcoat he had on.

Q The topcoat? A Topcoat, the outer coat, if you want to call it that.

THE COURT: Like the one you are wearing?

THE WITNESS: No. He had a topcoat on, Judge.

THE COURT: A light weight overcoat is what you mean?

THE WITNESS: Yes, that is right.

BY MR. HORNING:

Q It was a light weight overcoat, was it not? A Yes, I think it was.

* * * *

116 Q Was he a gin drinker? A As far as I know, he was not.

Q Was he a whiskey drinker? A Well, a cocktail—

Q I am talking—there are many kinds of cocktails, Doctor; gin— A I don't know too much about these drinks but I have seen him drink a cocktail where they would mix, I guess, whiskey and mixtures that go with it. I am no authority on it.

Q You didn't pay too much attention, is that it? A I don't drink much myself and I don't know much about them.

* * * *

118

Mary Wilson

* * * *

Direct Examination

BY MR. REILLY:

Q Mrs. Wilson, will you speak up so we can all hear you, please, and give the Court and jury your full name?

A Mrs. Mary Wilson.

Q You will have to keep your voice up a little louder so we can all hear you. A Mrs. Mary Wilson.

Q Where do you live? A 3601 McKinley Street, Northwest.

Q With reference to the residence of Mrs. Howard at 5604 Nevada Avenue, Northwest, where is that? A Well, the back of my house faces the side of hers. I am on

the corner of McKinley and Nevada and she is the
119 first house to the left.

Q You are neighbors? A Neighbors.

Q Did you know Mr. Howard in his lifetime? A Yes, I knew him.

Q How long had you known him prior to his death?
A About five and one-half years.

Q And will you tell the Court and the ladies and gentlemen of the jury, if you will please, if you ever visited in the house of the Howards? A Yes, I visited almost daily because I have children that would be over there or their children would be in my house and I went back and forth almost every day or so.

Q Would you relate, please, what Mr. Howard did around the house in the nature of work? A Like fixing the furnace or washing the windows?

Q Will you relate what you saw him do? A Those are things I saw him do.

Q What, if anything else? A Cutting the grass around, taking care of the yard, things like that, you mean. I saw him do that plenty of times.

Q What, if anything, would he do with his children, if you know? A Well, like helping them with
120 home work, something like that. Many times I saw him help the boy with his arithmetic and, on his day off, he would take the children to see his father. I remember that. He very seldom had a day off but that seemed like what he would do, take the children to see his father.

Q Did you visit in the house in the evening also?
A Yes; I would go over and get my boy and bring him home, something like that.

Q Did you know anything about the habits of sobriety of Mr. Howard? A I never saw anything like a drink or anything like that around there.

Q Did you ever at any time see him intoxicated?
A Oh, no, never. I never saw the man intoxicated.

MR. REILLY: That is all.

Cross Examination

BY MR. HORNING:

Q Did you ever see him take a drink at all? A No; never.

Q You never attended any social functions at the house, did you, Mrs. Wilson? A No. They never seemed to have any parties or anything like that.

* * * *

135

Cecil G. May

* * * *

Direct Examination

BY MR. REILLY:

* * * *

136 Q Where are you employed? A By the Capital Transit Company.

* * * *

Q Have you produced, pursuant to a subpoena of the Court, the records of the Capital Transit Company indicating the schedule of certain buses on the 23rd of March, 1948? A I have, sir.

Q Mr. May, will you examine those records and tell us, please, what time a bus left Fenwick and Okie Streets, Northeast, between the hours of 8 and 8:30 p. m. on that date?

MR. HORNING: Excuse me. May we come to the bench?

THE COURT: Yes.

(Thereupon counsel approached the bench and the following proceedings were had out of the hearing of the jury:

MR. HORNING: I desire to object to any testimony with reference to schedules of buses from Fenwick and Okie, Northeast, to Eighteenth and K Streets, or wher-

ever that point was and then schedules of buses from that point to Chevy Chase Circle on this night on 137 the ground that it is not relevant or material or pertinent to the issues which are raised in these pleadings; that there was no evidence that this decedent did use any of those buses. It is just as consistent with the position that he may have used a taxicab. No one has seen him on any of those buses and no one has yet seen him even as a passenger on the bus which was involved in the fatal accident.

MR. REILLY: What I expect to prove, sir, is this: That from Fenwick and Okie Streets, which is adjacent to the Ivy City Terminal, it takes so long for the bus to go from there to Eighteenth and K Streets; that there is there a point of transfer to go to Chevy Chase on a bus which would take approximately one hour to go from his place of employment to the place where the accident occurred at Connecticut and McKinley. We already have the testimony that he used the Capital Transit Bus as a means of transportation. That is why I wish to put it in.

THE COURT: The objection is overruled.

* * *

BY MR. REILLY:

Q Mr. May, will you examine those records and tell us, please, what time a bus left Fenwick and Okie Streets, Northeast, between the hours of 8 and 8:30 138 p. m. on that night? A Buses were scheduled to leave the Ivy City Terminal at 8:09½ p. m.; 8:17 p. m. and at 8:27 p. m.

Q Can you tell us, please, Mr. May, how long it would take that bus to get to Eighteenth and K or Nineteenth and K—make it Eighteenth and K first. A Northwest?

Q Northwest. A The bus scheduled to leave Ivy City at 8:09½ was scheduled to pass Eighteenth and K at 8:39½.

The bus scheduled to leave Ivy City at 8:17 was scheduled to pass Eighteenth and K at 8:44; and the 8:27 p. m. bus from Ivy City was scheduled to pass Eighteenth and K at 8:54 p. m.

Q The Ivy City you speak of, is that the Ivy City Terminal of the Washington Terminal Company? A Yes, sir, that is right.

Q Can you tell us the point of transfer at or near Eighteenth and K for Chevy Chase buses? A Eighteenth and I, the Glover Park bus. This line operates through K Street and the Connecticut Avenue bus operates through I Street.

Q Does there come a time when there is a transfer point for the west-bound buses that we have been talking about where they connect with a Connecticut Avenue bus? A There could have been a transfer at 139 Eighteenth and I Street, Northwest.

Q And where else? A At Twentieth and K.

Q Can you tell us, please, what time the buses that we have been talking about arrived at Twentieth and K Street? A This is an estimated time. There is no time for it from Nineteenth and K to Twentieth and K which I would estimate to be about a minute's running time which would be 8:40½, 8:45 and 8:55.

Q * * * Can you tell us the time that the bus No. 5018 that was in the accident we are now inquiring about arrived at Twentieth and K Street, Northwest?

* * * *

140 THE WITNESS: That bus would be scheduled to pass Twentieth and K at 9:04½.

* * * *

Q The bus leaving the Ivy City Terminal at 8:27 would arrive at Eighteenth and K at approximately 8:54? A Yes, sir.

* * * *

141 Q A bus passing Twentieth and K going to
Chevy Chase at 8:54 p. m. would arrive at Con-
necticut Avenue and McKinley Street at what time?
A Well, from the schedule I have one that would pass
Eighteenth and K at 8:51½. That is the schedule time
and it would arrive at McKinley Street at 9:22½ or
pass McKinley Street at that time.

* * * *

151 *Velcie Kerman Walsh*

was called as a witness by the plaintiff and, being pre-
viously duly sworn, was examined and testified as fol-
lows:

Direct Examination

BY MR. REILLY:

Q Mr. Walsh, may we have your full name,
152 please? A Velcie Kerman Walsh.

Q Where are you employed? A Capital Tran-
sit Company.

THE COURT: Keep your voice up, Mr. Walsh, so we
can all hear you.

THE WITNESS: All right, sir.

BY MR. REILLY:

Q How long have you been employed by the Capital
Transit Company? A Since November 28, 1941.

Q What are your duties? A Bus operator.

Q Inviting your attention to March 23, 1948, were
you the operator of a Capital Transit bus at or ap-
proximately 9:30 p.m.? A Yes.

Q What bus were you operating, what line? A Con-
necticut Avenue.

Q L-2 or L-4? A L-4.

Q At approximately what time did you leave your
depot on the evening in question on the run which

brought you to Connecticut Avenue and McKinley Street at approximately 9:30 p.m.? A I don't know the exact time. It is about 35 minutes.

153 Q Where did you leave from? A Thirteenth and Pennsylvania.

* * * *

Q Coming down to getting to Connecticut Avenue and McKinley Street, were you operating the bus that was in a fatal accident at that time? A Yes.

Q In which Mr. Howard was killed? A Yes.

Q Do you remember how many people got off at Connecticut Avenue and McKinley from the front door? A No, I don't remember how many got off.

Q Do you remember how many people got off at the rear door? A No.

Q Did you see anyone get off at the rear door? A I don't recall now.

Q Do you recall whether the rear door opened at Connecticut Avenue and McKinley Street to let passengers off? A Oh, yes.

Q What advised you that the rear door was closed on the evening in question? A Well, the air goes
154 off of the brakes when the rear door is closed.

Q Did you hear the air go off before you started up, sir? A Yes.

Q What else advises you that the rear door is closed? A It also locks the accelerator.

Q Let me put it this way: Is there a light on the panel? A Yes.

Q What color is that light? A It is yellow, usually.

Q And what is the purpose of that light, sir? A Well, the light is on while the door is open.

Q Do you remember the light going off at Connecticut Avenue and McKinley Street at the time of this accident? A No.

Q Did you look to see whether the light was off or not, sir? A I don't remember if I did or not.

Q Do you remember the condition of the weather at that time, Mr. Walsh? A Yes.

Q What was it? A It was raining.

155 Q Were your windshield wipers working? A Yes.

Q Tell us the condition of the windows on the right of that bus as you were going north on Connecticut Avenue? A The side windows were foggy.

Q How long had they been foggy? A I hadn't noticed that.

Q Do you recall whether all of the lights on the bus were on? A Yes.

Q Where was your mirror located? A There was one inside the bus and one outside on the left side.

* * * *

156 Q For what purpose do you use those mirrors? A I use those to see when everything is clear, that is all.

* * * *

Q What do you use the inside mirror for? A You can use it to see that the people are getting off all right and also you can see out the left-rear side if it is clear.

Q Did you use that mirror at Connecticut Avenue and McKinley Street at the time the decedent was killed?

A I don't remember now.

Q You don't remember? A No.

Q Did you use the outside mirror at the time the decedent was killed? A Yes.

157 Q Do you have a distinct recollection of that? A Yes, I do.

Q How far back could you see? A I don't know how far. I just look as far as I need to.

Q Will you please point out where that outside mir-

ror is? A It is on the opposite side of the bus from what is shown here, just about—

Q Then it would be on the left-hand side of the bus as you face it, is it not? A That is right.

Q So that when you were looking at the left mirror, you couldn't see the door from which passengers got out, could you? A No.

Q Did you look at all, Mr. Walsh, at people getting off the rear door? A I couldn't say for sure now whether I did or not.

Q Did you rely exclusively on the mechanical apparatus? A It is possible.

Q As you came to Connecticut Avenue and McKinley Street to stop, were any passengers waiting to board the bus? A No.

Q Did you see any people on the sidewalk at 158 all at the place where people were to board the bus? A No.

* * * *

Cross Examination

BY MR. HORNING:

Q Mr. Walsh, you mentioned to Mr. Reilly that you heard the air go off. Will you tell us what you meant by that?

* * * *

THE WITNESS: The air locks the brakes and also locks the accelerator and as soon as the rear door closes, it releases the brake and the accelerator.

BY MR. HORNING:

Q Mr. Reilly asked you if passengers got off 159 at the front door. What is the effect as to whether or not passengers may exit by the rear door? A Well, we open the front door. The passenger opens the back door by stepping on a step.

Q So that as the operator, after the front door is open, do you have any control over the rear door in its opening and closing? A No.

Q Is that entirely and exclusively within the control of the passenger on alighting from a bus?

* * *

THE WITNESS: Well, no. When the passenger steps on the step, there is an electric circuit in the step. That starts the door in operation. The door works automatically from then on.

BY MR. HORNING:

Q But you have no control over it as the operator? A No.

Q When the passenger emerges from the door, 160 the door automatically closes, is that correct? A Yes.

Q When the door fully closes, is that when you hear this air? A Yes.

Q Can you describe to us the sound or how audible it is or how loud? A No. Some are more than others. Just the air goes off is all I can say. The controls are free.

Q While that rear door is in use and before it fully and completely shuts, I think you told Mr. Reilly or you mentioned about the interlock. What does that mean, Mr. Walsh? A The interlock is a locking mechanism on the accelerator.

Q Are you able to depress your accelerator and move the bus before the rear door is closed?

* * *

THE WITNESS: No.

BY MR. HORNING:

Q Are you able to release your foot brake under those circumstances, that is, before the rear door is completely closed? A No.

* * *

161 Q When you hear the air go off, what did that indicate to you with respect to the condition of the rear door?

* * * *

THE WITNESS: It indicates the rear door is closed and everything is free to go.

* * * *

Q When that air goes off in that circumstance, what is the effect upon the accelerator which had previously been locked? A It is free.

162 Q Are you then enabled to propel the bus by means of the accelerator after that air has gone off? A Yes.

Q Mr. Reilly showed you Plaintiff's Exhibits 1 and 2, pictures of this bus. Directly behind the rear door of the bus, what is there on the inside of the bus? A Steps to go out.

Q That is right, steps from the floor level of the bus to exit via the rear door, is that correct, Mr. Walsh? A Yes.

Q And are those steps and that area, that level which is sunken below the level of the bus, does that extend for the width of the doors of the bus? A Yes.

Q And from your position in the front, using your mirror, could you see down into the step well? A No.

Q And from your position within the bus at your controls and in your operator's seat looking in the inner mirror of the bus, could you see anyone standing on the outside of the bus? A No.

Q On this night after the air went off, as you said, were you enabled to move your bus? A Yes.

163 Did you then move it? A Yes.

Q Prior to the time that the air went off, were you enabled to move the bus? A No.

Q Did you move it prior to that time? A I didn't try, no.

* * * *

MR. HORNING: I would like to offer in evidence at this time certain photographs which were initialed by the Pretrial Justice and which are contained within the pre-trial order.

THE COURT: Are the photographs sufficient without further explanation?

MR. HORNING: I think I can explain them, with Mr. Reilly's concurrence, because we both know the situation and the locale. These have already been marked as Defendant's Exhibit Nos. 1 to 5, inclusive.

THE COURT: They will be received in evidence.

(Defendant's Exhibit 1 to 5 previously marked for identification were received in evidence.)

* * * *

205

Velcie Kerman Walsh

was called as a witness by the defendant and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

BY MR. HORNING:

Q Mr. Walsh, you have already been sworn as a witness in this case. You were the operator of the bus which was involved in this accident on March 23, 206 1948, at Connecticut and McKinley Street.

Mr. Walsh, do you recall approximately the time you went on duty that afternoon? A No, I don't.

* * * *

Q Directing your attention to this particular trip at which the accident occurred, where was the route of the L-4 bus at that time? What route did you follow? A Thirteenth Street north to I; I Street to Twentieth and Twentieth to Connecticut and Connecticut Avenue to Chevy Chase Circle.

Q On the way on this trip and prior to this accident,
 207 had you experienced any difficulty with the operation of the doors of the bus?

* * * *

THE WITNESS: No.

* * * *

Q Would you tell us now, picking up the story at the time when you were approaching the bus stop sign at Connecticut Avenue and McKinley Street, tell us what you did, what you observed? A I came into the stop as usual and opened the doors and several people got off and I closed my doors and started out again. I just went four or five feet and I felt the rear run over something so I stopped the bus and opened the door to see what it was and some man on the street hollered in and told me I had run over somebody.

Q Then what did you do after that? A Well, I got out of the bus and walked back to see and I saw this man lying there and then I went across the street to People's Drug Store and telephoned for assistance. Then I went back to the bus and waited until the police and all arrived.

Q From the time that you stopped the bus after the accident until the time of the arrival of the police,
 208 had you moved your bus? A No.

Q When they arrived, it was still in the same position in the street as it was when you stopped? A Yes.

Q As you came into that bus stop sign or approached it to make your normal stop, did you see anything in the street? A No.

Q Did you make a normal stop at the bus stop sign? A Yes.

Q What was the position of your bus at the stop sign when you came to a stop before the accident? A The front fore was just a little above the stop sign,

about six or eight inches from the curb and the rear, I think, was about 18 inches away.

* * *

Q Well, what was the position of your bus with reference to whether or not it was parallel with the east curb of Connecticut Avenue? A There was a slight angle.

209 Q In which direction? A The rear was out from the curb about 18 inches, I would say.

Q Where, with reference to the intersection was the bus stop sign located at that time? A I believe it was about 15 or 20 foot below the south curb of McKinley Street.

Q By below, in which direction do you mean, towards town or away from town? A Towards town.

Q Towards town? A Yes.

Q And I think you said you stopped with the front of your bus a little above the bus stop sign. What did you mean by that, sir? A The front door a little above.

Q By above, which direction do you mean? A North.

Q North of the bus stop sign? A Yes.

Q Which door did you open of the bus? A I opened the front door.

Q And in the mechanism of the bus, how do you open the front door of the bus? A There is a handle lever on the wall of the bus beside the steering wheel.

210 Q Is that the manner for opening the front door of the bus? A Yes.

Q From your seat as an operator, did you have any such handle to open the rear door of the bus? A No.

Q When the front door of the bus is open, how do passengers get out of the rear door of the bus? A When they step on the first step, some mechanism in the step works the door automatically.

Q Of course, you know about that only as an operator and not as an engineer, is that right? A That is right.

Q Then when the passengers have left, completed their exit by the rear door, how does the door close? I mean, does it close through any action on your part or is that automatic? A It closes automatically.

Q While passengers are using the rear door of the bus for exit, what is the effect upon your ability to operate the bus? A The bus cannot be moved as long as the rear door is open.

Q And what is it that, from the operator's standpoint that prevents the movement of the bus? A The brakes are on and the accelerator is locked.

211 Q And when is any change in that condition affected so that you are enabled to operate the bus?

A As soon as the rear door is closed, it releases all of it automatically.

Q On this night at this location when you opened the front door of the bus, do you recall whether or not any passengers left by the front door? A Yes.

Q And after they had finished leaving by the front door, what did you do? A As soon as they were off the front door, I closed that and, if the back door was closed, I am free to go.

Q Was there any audible sign or signal to you that the back door was completely closed before you started? A Oh, yes. It is just impossible to start it until it is closed.

Q Did you hear anything before you endeavored to start the bus? A No.

Q I mean, specifically, did you hear anything with reference to the mechanism of the bus before you started to move the bus? A Nothing unusual.

Q What was usual that you heard, if anything? A Nothing; only the air goes off and the accelerator
212 frees itself. Sometimes that makes a little click.

Q On this occasion before you started to move the bus, did you hear the air go on?

* * * *

THE WITNESS: Yes.

* * *

Q What did you do after you heard the air go off?

A I started to pull on out.

Q What did you do in order to pull out into the street? A Well, you have to make sure you have a clear way to pull out.

Q Tell us what you did on this occasion, if you recall. A As you start out, I look in the mirror to see that there is nothing coming to run into and then pull right on out if there is nothing coming.

Q Did you check the traffic? A Yes.

* * *

Q Did you touch any of the controls in order
213 to move the bus? A Release the clutch and step on the gas.

Q You stepped on the gas and by that do you mean the accelerator? A Yes.

Q Were you able to move the bus with the accelerator? A Yes.

Q And proceed forward? A Yes.

Q You did that through your action, is that it? A Yes.

Q How far, approximately, had you moved before you felt anything? A I think about four or five feet.

Q During that period of space, four or five feet, can you tell us approximately what was the speed of the bus or its manner of acceleration? Describe that movement.

A Probably three or four miles an hour.

Q What was it that you felt after you had traveled this four or five feet? A Well, I just felt that that wheel run over something. That was all there was to it.

Q Up to that time, that is, from the time that you started away from the bus stop until you felt the back wheel run over something, had you had any notice or warning of any human being being close or near the bus?

* * * *

214 THE WITNESS: No.

* * * *

Q From the time that you checked the traffic on your left and then started until you felt the rear wheel of the bus go over something, did you hear anything unusual?

A No.

Q As soon as you felt this wheel go over something, what did you then do? A I just brought the bus to a stop, opened the door to see what it was.

Q What kind of a stop did you come to? A Just an ordinary stop.

Q Do you have, in the language of the operators, an emergency and service stop as distinguished from each other? A Well, no. I didn't jam on the brakes and stop, if that is what you mean.

215 Q Yes. When you pulled away from the bus stop, did you have any passengers still aboard your bus? A Yes.

Q Where was the end of your line, your route, at that time and place? A Chevy Chase Circle terminal.

Q How far removed was that from the scene of the accident? A One block.

Q And if it had not been for this accident, what would you have done upon arrival at the end of the line? A Changed signs and get ready to go back downtown again.

* * * *

216 Q What did you see the police officers do right there on the scene?

* * * *

THE WITNESS: They examined the doors on the bus for marks.

* * * *

217 Q On Defendant's Exhibits 6, 7 and 8, which are photographs of the rear doors of the bus in question, I direct your attention to heavy black rubber

in about the middle of the bus doors. What is that, Mr. Walsh? A That is a safety edge that puts on the brakes and locks the accelerator if anything is caught in between those doors.

Q Of what material is that or was that on this occasion? A Rubber.

Q And what happens in connection with the operation of the doors in connection with this safety device, if anything is caught within the door? A If your front door is open and anything is caught in the door, they will open back up. If the front door is closed and something is caught in them, it will lock the brakes and the accelerator until it is freed.

Q And if your front door is closed and something is caught within the rear door, I think you said the rear door opens back up? A If the front door is open, it does.

218 Q When that door is opening or is opened back up, what is the effect upon your brake and accelerator? A They remained locked.

Q They remained locked. In that situation, are you enabled to operate the bus? A No.

Q If your front door is closed and this rear door closes on something, what happens then? A If the door is in operation, it will open back up but if it had finished its operation, it won't open but it will lock the brakes and accelerator until it is freed.

Q In that situation, are you enabled to operate the bus? A No.

Q Is it the situation then, sir, that you are not able to operate the bus until the rear doors are closed without obstruction?

* * * *

THE WITNESS: No.

* * * *

Q Did you, after the accident, look at the decedent, the gentleman who was killed? Did you look at him after the accident? A Only for a glance when I first went back.

219 Q Were you able to identify him as having been a passenger on your bus? A No.

Q Did you, after the accident, observe any marks on your bus? A No.

Q Prior to the time of the arrival of the police, to your knowledge had the decedent been moved at all? A No.

Q Approximately how far was the body of the decedent from the rear of your bus after the accident? A About 10, 12 feet, I would say.

* * * *

Cross Examination

* * * *

221 Q It was raining quite hard at the time, was it not? A Yes.

Q And you said you were unable to identify the deceased as a passenger. Do you know that he was not on that bus? A No.

Q Did you make any statement at the time to the police as to whether or not he was a passenger on that bus or not? A No.

Q Did you say you knew or you did not know? A I didn't know if he was or not.

* * * *

222 Q Can you tell us how many people got out of the front of the bus at the time that you stopped at Connecticut and McKinley? A No, I cannot.

Q Would you say there were as many as seven or eight or do you have any recollection at all? A It seemed like there were eight or ten got off both doors but I don't know how many got off which door.

Q Can you tell us approximately how many got off the front of those eight or ten, if you know? A I made no point to remember that.

Q I presume you made no point to remember who got off the rear, either? A No.

Q Do you know whether or not men or women or both got off of the rear? A No.

223 Q You have no recollection of it at all? A No.

* * * *

Q When passengers were being discharged from the rear of the bus, do you have any recollection as to whether you looked into your mirror or not? A No.

Q Do you normally look into the mirror? A Normally I do, yes.

Q If you had looked into the mirror on this occasion, wouldn't you recall it, sir?

* * * *

THE WITNESS: No; it is too much routine.
224 I wouldn't remember.

* * * *

Q Coming particularly to the rubber strips that are on the rear door of the bus and I will use now, if I may, please, Plaintiff's Exhibit No. 2, I will ask you if you will tell the Court and the jury how close together those strips of rubber come when the rear door is closed? A Oh, they can be probably from an eighth of an inch to half an inch.

Q Do you mean there is an opening of between an eighth of an inch and a half an inch when the two pieces of rubber come together? A Yes.

* * * *

Q I think you stated to us, Mr. Walsh, that you had a hand lever to operate the front doors, is that correct, sir? A Yes.

Q Until that hand lever is operated by you, I take it that the rear doors cannot open at all, is that correct, sir? A By the treadle, yes.

Q But standing on the treadle will not open the
225 rear doors until you first manipulate the hand lever up by the driver, is that correct? A That is right.

Q Do you recall whether or not on the night in question you used the hand lever at all? A Yes, I did.

Q And using the hand lever, what is it that is done on the rear treadle to identify to you that someone wants to get off? A The door just automatically opens up.

Q How do you know the door opens up? I mean, do you hear it or is there some signal to you on the dashboard that the door opens up? A There is a light on the dash that comes on when the door opens.

Q Do you recall that light going on on the night in question? A No, I don't.

Q How long did that light stay on? A As long as the door is open.

Q And what happens to that light when you close the front door? A It stays on as long as the rear door is open.

Q Regardless of whether you close the front
226 door or not? A That is right.

Q Do you remember that light staying on on that evening or going out after you closed the front door? A No, I don't remember.

Q Do you recall whether you noticed it going on? A No.

Q Is there any discharge of air when you open the front door and someone stands on the treadle to open the rear door? A No.

Q It is operated mechanically just by standing on the treadle? A The treadle releases it some way and that makes it open.

Q And as long as that door is opened, the brakes are locked, I think you said? A Yes.

Q When the door closes, the brakes are released? A Yes.

Q And you can step on the accelerator? A Yes.

* * *

227 Q Do you recall, Mr. Walsh, as to whether or not the strips of rubber came together on this particular bus? A No.

Q You have no independent recollection of it at all? A No.

Q Did you hear any scraping on the rear door at all? A No.

Q Did you receive any information at all of anyone trying to get in the rear door? A No.

Q And when you used the mirror on the left-hand side of the bus, that was to see traffic coming in the same direction you were going on Connecticut
228 Avenue? A Yes.

Q Was much traffic coming, or do you recall? A I don't recall now.

* * *

229 Q So that, as I understand your testimony, your next stop was over on the west side of Connecticut Avenue at the depot? A Yes, that is right.

Q Were you on time that night, so far as you recall? A Yes.

Q Had you been delayed at all because of the weather? A No.

* * *

231 BY MR. REILLY:

Q I think you said that, upon the closing of the rear door that if anything is caught between the doors you have some instrumentality of safety there that would prevent the bus from going forward. Did you testify in substance to that? A Yes.

Q Would that depend upon the width of that which was caught in the door? A No, not if it was spreading the edges apart.

Q What is the width of the object that would
232 cause the spread of the doors, if you know? A

I couldn't say definitely. I would just guess at it, that is all.

Q Let me put it this way. Suppose I hold my hand in a vertical position like this (indicating) and I put my fingers between those safety edges. What would happen, if you know? A I don't believe anything would happen then.

Q That would not cause the doors to go open? A No, not if you held it in there—

Q Would it lock the mechanism of the bus, if you know? A I doubt it.

Q Let me put it another way, then. Let's take a coat. Suppose my coat got caught in it like that (indicating). Would that activate the sensitive edges of that rubber? A As long as it didn't move, I don't believe it would.

Q Let me go a little bit further. Let's assume my coat got caught there and on the inside of the bus a button should happen to get caught that didn't go between the sensitive edges of that rubber. What would activate it, if you know? A If it was pulled against it, it would.

Q Where would it have to be pulled against it, on this side or on this side (indicating)? A Either side.

233 Q Is the outer side of those pieces of rubber sensitized and by outer side, let me show you what I am pointing to: Is that outer side (indicating) sensitized? A I understand there is a wire that goes through the center of this rubber piece, each side, through the center of those rubber pieces and when they are pulled to either side it works the mechanism that locks the brakes and the accelerator.

* * * *

234

Redirect Examination

* * * *

Q Mr. Walsh, Mr. Reilly asked you and held his fingers vertically and you didn't think that holding the fingers in that way would operate the sensitive edge. Would there be anything to prevent that from being withdrawn? A No.

Q If there is anything less wide than to activate the sensitive edge, may it be withdrawn? A Yes.

* * * *

Recross Examination

BY MR. REILLY:

Q How would it be withdrawn? A If it is not wide enough to work that, it would slip right on out.

Q That would depend upon how close those doors came together, wouldn't it? A No, not if it is wide enough to hold the rubber.

Q Suppose I had a newspaper, take an ordinary newspaper and suppose that was caught between the doors. A If the doors were far enough apart not to depress the rubber, then it could just slip on out.

Q If they came close enough to hold it together but not to compress the rubber, wouldn't the bus take
235 that newspaper off? A If it was caught there and you was holding on to this side when the bus started to move, it would depress the rubber edge and work the mechanism.

Q Suppose I don't hold it? A It would carry it on away.

* * * *

THE COURT: Let me ask you a few questions, Mr. Walsh.

Can you open the front door while the bus is in motion?

THE WITNESS: Yes, sir.

THE COURT: If you should open the front door while the bus is in motion, would that release the mechanism for the rear door?

THE WITNESS: Only if someone were standing on the rear step.

THE COURT: Do I understand that if the rear door is closed and something is lodged between this rubber binding, that something will be free to be pulled out unless it is so wide as to start the mechanism in operation? Is that correct?

THE WITNESS: Yes.

THE COURT: And if that mechanism isn't started and the front door is open, what happens?

THE WITNESS: Well, if it is wide enough to start the mechanism and the front door is open, the
236 back doors open back up.

THE COURT: Open and then close?

THE WITNESS: Yes. They will open and close until it hits again and then flaps backwards and forwards until it is freed.

THE COURT: But if the front door is closed and something is lodged between the rubber binding of sufficient width to start the mechanism in operation, then what happens?

THE WITNESS: If someone is getting off and the door is in operation, it will open back up like that (indicating) but if it is closed and the air is off of it and the front door is closed, it will only put on the brakes and lock the accelerator and, of course, it rings a big bell inside the bus.

THE COURT: Did you say there was a light on the dashboard when the rear door opens?

THE WITNESS: Yes.

THE COURT: Does that light blink on and off as people step off the bus?

THE WITNESS: No.

THE COURT: It remains on until the door comes together?

THE WITNESS: Yes.

THE COURT: For the last time, is that it?

THE WITNESS: Yes.

THE COURT: As you look in your rear view
237 mirror on the inside of the bus, how much of that rear door can you see?

THE WITNESS: You can see above the back of the seat next to it.

THE COURT: It is so placed that you can see the rear door well down to the back of the seat and that obscures your view?

THE WITNESS: The top of the seat that is next to the door.

THE COURT: And that obscures your view there?

THE WITNESS: Yes.

THE COURT: I have nothing further.

* * * *

240

Hyman Feldman,

was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. HORNING:

Q Will you state your name, Mr. Feldman? A Hyman Feldman.

Q What is your profession, Mr. Feldman? A I am an engineer.

Q What institution did you graduate from? A Virginia Polytechnic Institute.

Q With what degree? A Bachelor of Science in mechanical engineering.

Q Did you specialize in your college training in any particular field of engineering? A Yes. I specialized in automotive engineering.

Q What year did you graduate? A 1939.

241 Q Following your graduation, what was your occupation in your specialized field? A I was employed by the Capital Transit Company as a junior engineer.

Q How long did you continue that occupation until there was an interruption? A For approximately a year and a half.

Q Then where did you go? A I went to the service, in the Army.

Q And did you follow your engineering profession in your Army service in your specialized field? A Somewhat, yes.

Q When you were released from the Army, what occupation did you then pursue? A I came back to Capital Transit Company.

Q What year was that? A That was in October, 1945.

Q From that time to the present, have you been engaged as an automotive engineer for the Capital Transit Company? A Until November, 1948, at which time I was promoted to my present position.

Q What is your present position, sir? A I am currently supervisor of automotive maintenance for Capital Transit Company.

242 Q Does that include, as part of your duties, buses of the Capital Transit Company? A Yes.

Q I take it that as an automotive engineer, you don't have anything to do with streetcars? A That is correct.

Q Just in the automotive field? A Buses, trucks and automobiles.

Q Are you a member of any societies of automotive engineers? A Yes. I am a member of the Society of

Automotive Engineers and a member of the Washington Society of Automotive Engineers.

* * * *

Q Are you familiar, Mr. Feldman, with the operation of the rear doors of Capital Transit buses?

A Yes.

Q And are you familiar with the safety devices on Capital Transit buses? A Yes.

* * * *

Q Are you familiar with the sensitive edge on such buses? A Yes.

Q And are you familiar with all of the safety appliances on Capital Transit buses?

* * * *

THE WITNESS: Yes.

BY MR. HORNING:

Q Will you explain to us the operation of the rear door of one of our buses? A Well, the bus is in motion and comes into a stop with the front door closed and the passenger standing on the rear door treadle, there is no action of the doors at all. After the bus comes to a stop and the front door is opened by the operator, if there is a passenger on the rear treadle the rear doors will open.

* * * *

THE WITNESS: When the rear doors begin to open, they always come fully open. By that I mean if the pressure is removed from the treadle prior to the time the rear doors come fully open, they will nevertheless come fully open before they start to close. The moment the doors begin to open, the brakes are applied and a device is actuated which prevents the application of power. That is, a device is actuated which prevents the accelerator peddle from being depressed. The moment that these two interlock devices are applied, the control of the bus is taken

away from the bus operator by means of the interlock devices. If the operator closes the front door before the rear doors are fully closed, he nevertheless does not regain control of the bus until the rear door come fully closed.

So far as the safety device is concerned, that is, the sensitive edge, that is a device which is placed along the moving edges of the rear doors. It consists of a rubber edge and within this rubber edge is a piece of wire cable and by means of relatively simple levers, the wire cable is connected to a small switch known as a micro-switch. It is a spring loaded device which, when no pressure is applied, remains in the off position and with a very small
 245 amount of movement, in the neighborhood of a thirty-second of an inch movement, the switch is closed and whatever the switch is wired to that circuit becomes activated.

By means of this sensitive edge, the following safety action is accomplished: If the front door is closed and a solid matter is placed between the edges of the rear doors and actuates this little switch I just described, if the front door is closed, the brakes are applied, the application of power is prevented by the device I described before which prevents the accelerator peddle from being depressed; a light lights up on the dash of the bus and a bell sounds.

If the front door is open and the sensitive edge is applied, the rear door opens, the light on the dash lights, the brakes are applied and the application of power is prevented.

I believe that is a complete description.

BY MR. HORNING:

Q Let me ask just a few questions which occur to me. Assuming, Mr. Feldman, that a bus is in operation and it is approaching a bus stop in the normal manner and a passenger were to step on the treadle and insert within the safety edge his three fingers or something of sufficient diameter to actuate the sensitive edge, what is the effect on the operation of the bus?

246 THE WITNESS: In that case, the brakes would be applied. The application of power would be prevented; a light on the dash would come on and a bell would sound.

BY MR. HORNING:

Q In that event and under that assumption, would the doors open or would they remain closed? A They would remain closed.

Q Assume that the operator has made his normal stop and he has opened his front doors and the passenger then steps on the rear treadle. What happens to the door? A The doors come open.

Q At that time, is the rear door under any control of the operator? A No.

Q As the passengers emerge via that rear exit while that front door is opened by the operator, what is the action of the doors? A The doors remain open.

Q Do they open and close by any action of the operator or passenger or is it automatic? A The operator has no control over the rear doors. It is automatically controlled by the passenger.

Q Assume, Mr. Feldman, that a passenger, when
247 the front door is open, steps from the treadle of the rear door to come out and there is no one following him as he steps clear down on to the sidewalk or the street and he steps away from the door. What happens to the door? A The door closes.

Q Is that done through any action of the operator or is that automatic? A It is automatic.

Q After the lapse of what time interval, approximately?
A We time our doors at one and one-half seconds to close them.

Q One and one-half seconds to close? A Yes.

Q What is the time on the opening? A One and one-half seconds.

Q The same time limit? A Yes.

Q In that assumption that I have just stated, the passenger steps off, no one following him, and the door closes, what effect does that have on the ability of the operator to regain control? A After the doors are completely closed, the two interlocks I described before are released and the operator takes over control of the bus.

Q Is there any sign or signal from any of these
248 mechanical appliances to the operator when that rear door is completely closed? A Yes. When the rear doors open there is a light on the dash. Likewise, whenever the brakes are applied there is a light on the dash so that whenever the rear doors are anything but fully closed there are two lights lighted, one indicating the door is not fully closed and the other indicating that the brakes are applied.

Q When, under that assumption, when that rear door closes completely is there any audible sound to the operator respecting the air? A Yes. The accelerator interlock is air operated and the operator can hear the exhaust of the air out of the interlock as well as the exhaust of air out of his brakes.

Q Mr. Feldman, assume that the front door of the bus is open and some objects were inserted within the rear door as it closed of sufficient diameter to actuate the sensitive edge of the door. What happens to the rear door so long as that object remains in that position? A Well, instantly the sensitive edge is actuated; with the front door open the rear doors come fully open and the accelerator interlock and the brake interlock is applied.

Q In that situation, is the operator able to move the bus? A No, he is not.

249 Q Suppose, in that situation, that I were to hold my hand in the space where, on its initial closing, the door touched me and I continued to hold my hand there after it opened. What then happens? A The doors continue to open and shut. Each time the sensitive edge would strike your arm it would actuate the sensitive edge

mechanism. It would then come open. It would strike your hand and come open. Each time the brake and accelerator interlock would be applied.

Q How much diameter of an object within the sensitive edge is required to actuate the sensitive edge and make it perform as you have described? A I would say a minimum of about two finger widths.

THE COURT: Get that in inches.

THE WITNESS: I would say approximately an inch to an inch and a half.

* * *

250 Q If some object which was less than the diameter of this inch or inch and a half required were within that sensitive edge, what is the situation then respecting that object? A Well, the object would either be carried away with the bus or if it were rigidly attached to something, that is, if a person were holding that object or if it were attached to a building or a tree, it would simply slide out of the sensitive edge.

Q Assume, Mr. Feldman, that I had a coat or an overcoat which was of less diameter than that which was required, as you have stated, to actuate the sensitive edge and I stepped off of the bus and the bus door closed on that and I walked away from the bus. Would I be enabled so to do without any action of the sensitive edge?

* * *

251 THE WITNESS: Yes.

BY MR. HORNING:

Q In that same situation, Mr. Feldman, the front door of the bus opens and I step off of the bus and the bus door, for some reason or another closes on me. Under that assumption, with a portion of my arm or my hand within the door as it closes and assume that that portion of my arm or my hand is of sufficient diameter, wider than the inch or the inch and a half, wide enough to actuate the sensitive edge, what happens then?

* * * *

THE WITNESS: The bus doors immediately come open; application of power is prevented and the brakes are applied.

* * * *

252 Q Mr. Feldman, assume that the passengers who had emerged from the front door had finished leaving via the front door and the operator had closed the front door and assume further that passengers were still emerging via the rear door. Then when the last passenger stepped off of the rear door, assume that a portion of his clothing or overcoat of less diameter than this inch or inch and a half required to actuate the sensitive edge and the door closes on that portion of his clothing, despite that would he be enabled to walk away from the bus without any action on the part of the sensitive edge?

* * * *

253 THE WITNESS: Yes. He would be enabled to walk away from the bus.

* * * *

Q In that situation, would the doors hold his clothing? A Absolutely not.

Q And in the former situation with the door open and under that same assumption, would those rear doors hold his clothing? A No.

Q Mr. Feldman, assume that same situation, namely, that the passengers had finished emerging via the front door and the operator had closed the front door while people were still getting off the rear door and then, as the last passenger got off of the rear door, for some reason or another the door, the rear doors closed on a portion of his body of sufficient diameter to actuate the sensitive edge, say, his hand or his arm or a portion of his shoulder, what is the effect at that time in that assumption on the bus and its mechanism? A The rear doors would immediately come open, application of power

would be prevented and the brakes would be applied.

254 Q And in that situation, would he be held and caught within the rear door? A No.

* * * *

256 Q Mr. Feldman, do you have the record of the bus which was involved in this accident, No. 5108?

A Yes, I have the maintenance records.

Q And that is the official company record? A Yes, sir.

* * * *

257 Q Would you examine the record and see if there have been, since the accident, respecting the mechanical condition of the bus and the instrumentalities concerning which you have testified any repairs or changes or anything of that sort? A There have been certain units replaced which are related, perhaps, to the operation of the door.

MR. REILLY: I object.

THE WITNESS: —are related to the operation of the doors but not directly. I refer particularly to an
258 air compressor which furnishes the compressed air which operates the door engines. Since March 23, 1948, there have been three air compressors installed on this bus.

THE COURT: Does that actuate the brake mechanism?

THE WITNESS: No, Your Honor. The air compressor compresses the air which eventually operates the brakes.

THE COURT: Upon its release?

THE WITNESS: Yes, upon being called for by certain other mechanisms on the bus.

THE COURT: That is part of the mechanism of the door operation, is it?

THE WITNESS: It furnishes air which operates the doors after certain other mechanisms call for that air.

THE COURT: I see.

BY MR. HORNING:

Q Those compressors were put in on what date, according to the record?

MR. REILLY: I object.

THE COURT: You said on what date. You testified some compressors have been replaced, didn't you, Mr. Feldman?

THE WITNESS: Yes.

MR. REILLY: I withdraw the objection.

THE WITNESS: The first compressor replaced after March 23, 1948, was replaced on December 29, 1948; the second one on June 17, 1949 and the third one on February 3, 1950.

* * * *

259 Q Since the date of this accident, has the bus, according to the record which you have, been in service? A Yes, sir.

Q And can you tell us anything respecting the frequency of the compressor replacement as to whether that is usual or unusual in the operation of the bus over that period of time? A I would say that the first compressor change that I mentioned operated less mileage than the average; but the second one operated about average and the third one is still in operation.

Q What is the function of the compressor? A The compressor takes air at atmospheric pressure and compresses it to a hundred pounds per square inch and delivers that air to a receiver.

Q And then what happens to the air after it has been compressed from atmospheric pressure to this hundred pounds with reference to the operation of the doors of the bus? A The air, after being compressed, is delivered to an air receiver, an air tank and it is stored in this air reservoir, air tank until the energy required in this compressed air is called for by means of the operator throw-

ing a valve which releases the air from the tank to the door engine or when a passenger steps on the treadle by means of an electrical circuit which operates an
 260 air valve and this energy stored in the tank is delivered to the rear door engines.

Q The air thus compressed by the compressor is used for other purposes, is it, sir, on the bus? A Yes, it is.

Q Rather than for only the door mechanism? A Oh, yes.

Q For what other purposes? A The air is used to apply the brakes. The windshields are air operated, and I believe that is all.

Q You have mentioned the average mileage for a compressor. Is it necessary, under your practice, to renew a compressor on the average of every so many thousand miles? A No. We don't replace air compressors based on mileage. We replace them by condition. However, after we replace several hundred compressors, they do fall into a pattern on mileage.

Q That is what you meant? A Yes, that is what I meant.

Q Other than that, according to the records which you have, have there been any replacements which would make the operation of the bus doors today any different than they were on the date of the accident? A I don't see anything in the record that would indicate that, but I want to look to make sure.

* * * *

261 THE WITNESS: I see nothing in the records at all.

* * * *

269 (Thereupon the jury in custody of the Marshal, the Court and counsel left the Courthouse to inspect the bus. During the inspection of the bus the following proceedings were had:)

270 THE COURT: In view of your request, Mr. Horning, I will permit Mr. Feldman to state what

he is demonstrating and also permit Mr. Reilly to cross examine out here in connection with those matters because I am afraid a pantomime, without some verbal explanation, would not be as helpful as it would with a verbal explanation. You may state what you are doing when you make any demonstration.

You may examine him further and you, Mr. Reilly, may cross examine out here on those matters.

THE WITNESS: The front doors are open and I step on the treadle. I get off the treadle and the doors close. I want to demonstrate now that the rear doors come fully open after pressure is applied to the treadle, notwithstanding when the pressure is removed.

Now, when the rear doors come open, the two interlocks are applied. When the doors come closed, they are released. You can hear them release by listening to the air exhaust of these two devices.

You will also note by looking at the dash—you can see it from here—there are a series of four little jewels. They light up. The two right ones light up when the rear doors open. One of them indicates the door is open. The other one indicates that the brake is applied.

The brake is applied. This light (indicating)
271 comes on. When the rear door opens both lights come on indicating that the rear door is open and also that the brake is applied.

Now, if you will watch the second pedal to the left, the brake pedal, you will see that it is depressed when the back door comes open indicating that the brakes are applied. When that pedal is depressed, the one to the right is prevented from being applied. That is the accelerator pedal. It is impossible to depress that pedal when the brake pedal is depressed. You can try that, if you like.

The sensitive edge is this element here (indicating). In this element are the cables I referred to. Up at the top are the switches I referred to and these wires you see

hanging down here (indicating) carry the current away to the operating devices up here (indicating).

The front door is open. When the front door is open, I put my fingers in the sensitive edge. The brakes are applied. The accelerator cannot be depressed and the pair of lights are on on the dash. The front door opens.

Now, with an object in the door, it will continue to open and shut.

I am running out of air so I have got to pump up the air a little bit.

Now with the front door closed, step on the treadle and nothing happens. Front door closed. Hand in the sensitive edge, bell rings, light lights, brakes are applied, accelerator interlocked.

272 I am running out of air.

THE COURT: Do you want to pump up more air?

THE WITNESS: Yes. This is most unusual.

Front door closed. Step on the treadle and nothing happens. Hand in the interlock (indicating), accelerator, brake, lights and bell.

I believe that that completes the demonstration.

MR. HORNING: What I wanted to ask is—would you open the front door?

THE WITNESS: Yes.

MR. HORNING: Now, would you try to move the bus?

THE WITNESS: It is locked.

MR. REILLY: Just one minute. The front door is open. I am asking the jury to watch my hand as it goes down. It is in between the two doors. The front door is open.

I am asking the jury to watch or if you prefer, Mr. Feldman, you can do it, you can do this if you wish.

Will you run your hand down on the inside and if you want to go harder than I go, come on (demonstrating).

All right, sir. Now, one more thing (demonstrating).

May the record show I am sticking my coat through

the doors? The front door is open and nothing is happening.

* * * *

273 MR. REILLY: * * *

It is only the edges here (indicating), Mr. Feldman, as they come together that are sensitized, is that correct?

THE WITNESS: No.

MR. REILLY: Is this sensitive where I am rubbing my hand now (indicating)?

THE WITNESS: It is sensitive if you apply sufficient pressure.

MR. REILLY: All right.

May the record show at least I pressed with sufficient pressure to get my hand dirty. Let the record show I am now pushing that door with my weight, pushing it out roughly an inch. I will get down a little farther and do it with sufficient force to push it out an inch and a half.

Will you close the front doors? (Bell rings.)

* * * *

MR. HORNING: Would you demonstrate where, on the doors, the sensitive edges are, this mechanism?

THE WITNESS: Yes. The wire cable runs from the bottom through this rubber up to approximately
274 here (indicating). It is connected through a series of levers to a tiny switch approximately where my finger is (indicating), a small micro switch which you can hear operate, if you like.

MR. HORNING: Demonstrate it, please.

THE WITNESS: To hear the switch, you have got to get your ears next to the door. You have to listen before the doors begin to operate.

I can demonstrate that by turning the emergency switch off so the doors won't work. That way you can hear the switches operate but nothing will happen. If you want me to do that—

MR. HORNING: No, that is all right. Thank you.

MR. REILLY: Will you explain to us, please, where this wire or whatever it is that activates those doors is located on the right rubber strip of the door?

THE WITNESS: It runs right down (indicating).

MR. REILLY: That is what I want to know. Whereabouts inside?

THE WITNESS: Just about here (indicating) is my guess but you can feel it.

MR. REILLY: Do you know, sir?

THE WITNESS: Yes, I know. It is just approximately at this point where my thumb is (indicating).

MR. REILLY: Let me see if I can feel it—the front door is open and I have got my finger through and
275 playing with it. May the record show that my right hand is through to the base of my index finger, Judge Pine.

How far down do you have to go under before it activates?

THE WITNESS: It activates the full length.

MR. REILLY: You just observed it did not activate for a distance of a foot.

THE WITNESS: It is not meant to activate with the thickness of a finger, sir.

MR. REILLY: I have to touch, do I not, this sensitive edge which you say is right here?

THE WITNESS: Yes.

MR. REILLY: Is that the sensitive edge where my knuckles are?

THE WITNESS: The sensitive edge starts at the bottom of the levers that I described. I believe the levers are just about where your knuckles are, sir.

MR. REILLY: Is that the sensitive edge where my knuckles are?

THE WITNESS: I don't believe it is.

MR. REILLY: You put your knuckles on the sensitive edge.

THE WITNESS: I will have to feel for it. There (indicating) is the sensitive edge, right there.

MR. REILLY: All right. Why doesn't it come together?

THE WITNESS: Either we are out air or—

MR. REILLY: Let's get some more air.

276 MR. Feldman, will you explain for the record just what you instructed the conductor to do when he opened that window of that compartment then?

THE WITNESS: There is a switch in the sign compartment which is an emergency switch which deenergizes the entire door circuit.

MR. REILLY: May we have a ruler, sir, to see how far back from the outside door—

THE COURT: May you have what?

MR. REILLY: A ruler, a measure, to measure how far is is sensitized.

THE COURT: Can't you stipulate on the distance?

MR. REILLY: I will see—

THE COURT: Here is a ruler (handing a ruler to counsel).

MR. REILLY: You show me, if you will, please, Mr. Feldman, where the part of the mechanism that causes those doors to fly open is compared to the outer edge of the rubber where the doors close?

THE WITNESS: I have my finger on it.

MR. REILLY: Keep it open. Is this it right here (indicating), sir?

THE WITNESS: This is it (indicating).

MR. REILLY: May the record show, sir, that that is between one inch and one inch and a quarter
277 from the outside edge of the rubber?

THE WITNESS: I would say the edge of it is about three-quarters of an inch.

MR. REILLY: Bring it to the edge of the rubber. There is the edge of the rubber, isn't it?

THE WITNESS: Yes, sir.

MR. REILLY: All right.

THE COURT: It is important for the jury to see what you are doing.

MR. REILLY: In a moment, we are going to agree, however; a little over an inch.

THE WITNESS: I would say about seven-eighths of an inch.

MR. REILLY: I think it is a little more than an inch.

Mr. Horning, maybe you and I can agree on it.

MR. HORNING: Mr. Feldman measured it.

MR. REILLY: So did I.

THE WITNESS: You agree that this mark right there (indicating) is the edge?

MR. REILLY: Yes.

THE WITNESS: Right where the little hole is. It is closer to a half, isn't it?

MR. REILLY: I want it with the edge.

THE WITNESS: That is the edge, that is three-quarters of an inch.

MR. REILLY: Three-quarters of an inch.

278 Will you tell us, please, Mr. Feldman, whether that is the normal opening between the two rubber strips that I am now looking at?

THE WITNESS: I would say that is average.

MR. REILLY: Can you tell us, please, what that opening is at the base of the door?

THE WITNESS: Yes, sir. It appears to me to be about a quarter of an inch, maybe a little bit over or perhaps a sixteenth, a sixteenth at the outside.

THE COURT: Is there anything further?

MR. REILLY: No.

MR. HORNING: Just one other question.

Mr. Feldman, Mr. Reilly directed your attention to one finger inserted in the edge. You said it was not designed to work with one finger. Would you show us how much it would take?

THE WITNESS: I would say two fingers.

MR. REILLY: May we use them vertically?

MR. HORNING: You were whirling them around. Take them perpendicular to the face.

THE WITNESS: May I open the doors and let them close on them because it is difficult to get them in?

MR. HORNING: Yes.

(The witness demonstrated.)

THE COURT: I suggest that the jury walk out
279 by that door and observe whatever they care to observe as they walk out.

MR. REILLY: Mr. Horning, may we have the jury observe the position of the mirror that we were talking about in the court as long as we are here?

MR. HORNING:

* * * *

Mr. Feldman, I think you said there was a point from the top down to a certain point where it was taken up with some other mechanism and the sensitive edge began?

THE WITNESS: That is correct.

MR. HORNING: About how far is that from the top?

THE WITNESS: Ten inches.

MR. HORNING: That is all. Thank you.

THE COURT: The jury may leave the bus by way of the rear door and each of them may stand around and look at it and operate it so that they will have a complete understanding of its operation.

(Thereupon the Court, the jury and counsel returned into the courtroom and the following proceedings were had:)

Direct Examination (Resumed)

BY MR. HORNING:

Q Mr. Feldman, does that record on that bus show

the date of the inspection prior to the 23rd of
280 March, 1948? A Yes, it does.

Q What was the date of that inspection? A
March 8, 1948.

* * * *

Q What is done at that time? A A regular mileage
maintenance inspection.

* * * *

THE WITNESS: They check all running gear includ-
ing the engine, engine components, air compressor, wheels,
brakes, clutch transmission, differential, front axle, steer-
ing, doors, door operating mechanism, all air equipment,
governors, and other elements similar to those I have
described.

BY MR. HORNING:

Q Then when next after this accident was it inspected?
A On the 8th of April, 1948.

* * * *

281 Q Does the record show any defects or repairs,
that sort of thing between those two dates of
inspection? A The record does not show anything.

* * * *

Cross Examination

BY MR. REILLY:

Q Will you tell us what kind of a bus that was? A
That is a White bus.

Q What was the year of its manufacture? A Am I
permitted to look at my notes?

Q Certainly. A 1942.

Q How long had it been in use at the time of the
accident? A Since 1942 to 1948, six years.

Q How many miles had it operated? A At the inspection prior—

282 Q How many miles had the bus traveled from the time the Capital Transit Company had it until March 23, 1948? A I am unable to answer that.

Q Does your record indicate the mileage on the bus at all? A Yes, it does.

Q What does that record indicate? A I am not sure I understand your question, Mr. Reilly.

Q When you made an examination, you put down the mileage, didn't you? A I have the date—the mileage at the date of inspection.

Q What was that? A At the date of the inspection prior to the accident, the mileage was 107,448 miles.

Q The last inspection that you had was on March 8, 1948, roughly 15 days before the accident? A Yes, that is correct.

Q Do you know about that inspection yourself or wasn't it done by some workmen? A Yes, by a mechanic in the shop.

* * * *

283 Q Who? A A mechanic by the name of Lazarus.

Q Where is he now? A I can't answer that. I don't know.

Q Did he make any slip indicating what had to be done at that time? A Yes.

Q Have you got those slips with you? A No, sir.

Q What did he do with those slips? A Turned them over to either his foreman or the garage clerk.

Q Then what happens? A The information on the cards is extracted and entered on this record that I have here.

Q By whom? A By the garage clerk.

Q That is done under your supervision? A Yes.

Q When did you look at that particular record
284 with reference to March 23, 1948? A Approximately five or six days ago.

Q 1951? A Yes.

Q What is the weight of the bus? A 19,400 pounds weight.

Q What is the distance from the rear door to the right rear wheel? A I don't know, sir.

Q Do your records indicate that? A No.

Q What is the height of the door? A Height of the door?

Q Yes. A I don't know. I would have to guess.

Q Do your records indicate that? A No; the records do not indicate that.

* * * *

285

Emmett R. Waters

was called as a witness by the defendant, being previously duly sworn, was examined and testified as follows:

Direct Examination

BY MR. HORNING:

Q Sergeant, you have already been sworn, have you not? A Yes, sir.

Q And is this record the official police record involving this accident? A Yes, sir.

Q Sergeant, what time did you respond to the scene of the accident on the night in question, March 23, 1948? A I was there at 10 o'clock or shortly afterwards.

Q What did you do when you arrived there? A I got on the bus; Corporal Duvall was already on the bus talking with the driver; had a certain conversation with the driver and with Corporal Duvall. We went to the back where we examined the walkway or floor. We got off the bus by the rear door and then we had the bus driver close the front door, made a test on the back door, ex-

amined the side of the bus to see that it was in good shape, nothing to snag anything with.

Q In connection with your test on the scene, what did you do? A On the inside, we tested the treadle
286 to see that it opened like any ordinary bus would that you could alight from it. On the outside, we tested it by running our fingers into the rubber between the two doors to see if it operated.

* * * *

Q As the result of this test that you made on the scene, did you find anything unusual about the operation of the door? A No, sir.

Q Did you inspect the bus for any marks on the bus? A We did, but we found none, as I recall.

Q Would your recollection be refreshed if you looked at the file to see whether or not you found any marks on the side of the bus near the door or front or any other place on the exterior of the bus? A Yes. I have my notes here, if I may refer to them.

* * * *

287 THE WITNESS: I have no notes of any marks on the bus.

* * * *

Q Does that mean that you observed no marks on the bus? A No marks.

Q Where was the bus? A What was its position when you arrived there? A It was parked at the curb, the east curb of Connecticut Avenue.

Q And after you had made these tests that you have described, what did you do with reference to the bus?

* * * *

288 THE WITNESS: I did nothing with reference to the bus.

* * * *

Q Did you issue any order with reference to the bus? A I did, sir.

Q What was the order? A The Capital Transit was to move the bus to a barn and that it was to be taken to a D. C. inspection station during the open hours the following day.

Q What do you mean by "D. C. inspection station"? A It is one of the two stations maintained by the District for the inspection of motor vehicles.

Q That is an official agency of the District of Columbia? A Yes, sir.

Q Did you subsequently receive an official report with reference to that inspection? A Yes, sir.

Q Do you have that report in that file? A Yes, sir, it is here.

Q Would you produce it, Officer? A This is it (indicating).

MR. HORNING: May this be marked with the defendant's next number for identification, No. 9, I think it is?

(Report of the D. C. Inspection Department was marked Defendant's Exhibit No. 9 for identification.)

* * * *

293 Q These are the remaining portions of the file. Officer, in connection with your investigation, did you do anything further that evening on the scene? A Not on the scene, no, sir.

Q Later on that evening, did you have a conversation with the operator? A I did that and that was reduced to writing.

Q Then the following morning, did you have a telephone conversation with Mrs. Howard? A Yes, sir.

Q Will you tell what you said to her and what she said to you in reference to this matter? A Again I will have to refer to my notes to be exact on it.

Q Yes, you may. A I contacted her at 9:30 a.m. on the 24th at Emerson 1901. She stated that her husband

was a machinist at the Washington Terminal and
 294 usually got off at 5 p.m.; worked overtime last
 night. It was his custom to take a Chevy Chase
 Circle bus and if eastbound bus was in he would take
 that to Nevada Avenue. Otherwise, he would walk. Dixie
 cups were for home use. She just had baby and husband
 was bringing gin to her. Was in perfect physical condi-
 tion, et cetera.

* * * *

295

Cross Examination

BY MR. REILLY:

Q Sergeant Waters, I think you said that when you
 got to the scene the bus was parked up against the curb?

A Close to the curb.

Q And that you at that time had a conversation with
 the driver of the bus, Mr. Walsh? A Yes, sir.

* * * *

Q Will you relate to us the conversation which you
 had with the bus driver? A The conversation at the
 scene was merely a bare outline of the facts, as I
 296 recall it, as to whether or not he recalled this man
 as a passenger. He did not; whether there was
 anything unusual about the discharge or taking on of
 passengers. There was nothing unusual about that; or
 whether there was anything unusual about the start of
 the bus from his position or anything unusual about the
 stop to discharge passengers.

* * * *

THE WITNESS: And the fact that he didn't see the
 man—I think someone called his attention to the man and
 he stopped after he felt a slight bump on the rear wheel.

BY MR. REILLY:

Q Did he indicate to you how many bumps he heard?

A One.

Q The next morning when you had a conversation with

Mrs. Howard, the decedent's widow, I think you said that the decedent was bringing gin home to her. Is your recollection right clear about that, Mr. Waters? A Only from the notes that I have written here.

Q Did she state something such as this to you, that he was bringing gin home or have you any independent recollection of it? A I have no independent recollection of it.

Q Will you see if you can refresh your memory and see whether or not you can now state whether he was bringing gin home or whether he was bringing it home to her for her personal use? A My notes state, "and husband was bringing gin to her."

Q Did you proceed with that further to determine whether that was for her personal use or whether it was for the home? A I don't recollect whether I asked her about the use of it or not.

* * *

298

Thomas Carroll Higdon

* * *

BY MR. HORNING:

Q Will you state your name, Mr. Higdon? A Thomas Carroll Higdon.

Q What is your occupation? A I am an inspector for the Department of Vehicles and Traffic.

Q Of the District of Columbia? A That is right.

Q Were you such inspector of the District of Columbia on March 24, 1948? A I was.

Q And on that date, did you have occasion to inspect the Capital Transit bus which had been in an accident the preceding day? A I did.

Q I show you a document which has been marked for identification as Defendant's Exhibit No. 9 and ask you if you are able to identify that. A Yes.

299 Q What is that document, Mr. Higdon? A This is a duplicate of an inspection card that was made of the bus.

Q Was that made by you? A Yes, sir.

Q Contemporaneously with your inspection? A With the inspection, that is right.

Q Would you interpret what that record is, tell us what it shows? A It shows that the bus was in good mechanical shape when it came through inspection. Each one of these punches at the bottom represent a position that the bus was checked in and it was punched at the bottom. Nothing punched on the side which shows everything was O. K. with it.

Q In connection with your inspection, did you make an inspection of the rear doors of the bus? A I did.

Q What was the result of that inspection?

* * * *

Q Did you find anything defective in connection
300 with the condition of the rear doors of the bus at the time of your inspection? A I did not.

Q When you make up your inspection record, what do you do with the original and with the copies of that inspection record? A We make four records now. We were making three then. One goes to the office, one goes to the owner of the vehicle and the other is given to the police officer and now we make one that we keep for ourselves.

MR. HORNING: I offer Defendant's Exhibit No. 9 in evidence.

MR. REILLY: No objection.

THE COURT: It will be received.

* * * *

Cross Examination

BY MR. REILLY:

Q I understood your direct testimony to Mr. Horning was that you examined the rear door. A I did.

Q Of the bus? A I did.

Q To see whether it opened and closed prop-
301 erly? A Yes.

Q Do you recall, Mr. Higdon, whether you put
a man's coat in there at all or any part of a man's coat?
A I didn't use a coat for the examination. I used my
hand.

MR. REILLY: That is all.

MR. HORNING: When you used your hand, did you
find the doors functioning properly?

THE WITNESS: Yes, sir.

MR. REILLY: When you put your hand in, did you
double up your fist or anything like that?

THE WITNESS: No, sir.

MR. REILLY: What did you do?

THE WITNESS: Stuck my fingers in.

MR. REILLY: You stuck your fingers in just like this
(indicating)?

THE WITNESS: Yes.

MR. REILLY: What part of the doors did you stick
it in?

THE WITNESS: The rubber.

MR. REILLY: Upper or lower?

THE WITNESS: Midway.

MR. REILLY: You didn't do it at the bottom?

THE WITNESS: No, about a man's height where
you would reach in front of you.

MR. REILLY: Did you put your fingers in in a
302 horizontal position like that (indicating)?

THE WITNESS: I did not.

MR. REILLY: Just like this (indicating)?

THE WITNESS: Like that.

* * * *

Richard M. Rosenberg

was called as a witness by the defendant and, being first
duly sworn, was examined and testified as follows:

Direct Examination

BY MR. HORNING:

Q What is your full name, Doctor? A Richard M. Rosenberg.

Q Are you a practitioner of medicine within the District of Columbia? A I am.

Q From what institution did you graduate? A Georgetown University.

Q In what year? A 1926.

THE COURT: Is there any question about his qualifications?

MR. REILLY: No.

BY MR. HORNING:

Q In addition to being a medical practitioner, do you hold any office in the District of Columbia under the Government of the District of Columbia? A I am one of the deputy coroners.

Q And you have been for how many years, Dr. Rosenberg? A Since 1934.

Q In connection with the performance of your duties as deputy coroner, did you perform an autopsy upon the body of one Edward T. Howard? A I have.

Q Have you produced the official morgue record of the results of that autopsy? A I did.

Q What date did you perform the autopsy, Doctor? A March 24, 1948, at 12:30 p. m.

* * * *

311 BY MR. HORNING:

312 Q Tell us, with your memory refreshed by that official record, tell us what you found when you did the autopsy on this decedent? A The decedent had sustained a very severe head injury that is very unusual. In 15 or 18 years, I can recall just one other and I have a recollection of that.

Q What was the type of the head injury which he sustained? A His head was completely crushed.

Q And was there any other evidence of trauma or injury to any other portion of his body other than the head?

A Not that I recall.

Q And in connection with the autopsy, did you examine any of the internal organs of the deceased? A Yes.

Q What did you examine?

* * * *

THE WITNESS: I examined all his internal organs.

BY MR. HORNING:

Q Specifically with reference to the liver, did you examine that, Doctor?

* * * *

THE WITNESS: Yes.

* * * *

314 Q In connection with the performance of the autopsy, did you take any blood sample? A I did.

* * * *

316 BY MR. HORNING:

Q When the sample blood is taken, where is it sent? A To the District Chemist.

Q And following an analysis there, do you receive in the morgue the official report of that analysis? A I do.

Q Is that a part of the record which is required to be maintained at the D. C. Morgue? A It is.

Q Do you have that with you? A I do.

MR. HORNING: May this be marked as defendant's next in number, Exhibit 10?

(Report of D. C. Chemist on blood sample was marked Defendant's Exhibit No. 10 for identification.)

* * * *

320 Q Doctor, in connection with the performance by you of an autopsy in the usual course of your work, I think you said you made a contemporaneous writing in your own handwriting right there at the time that you did it? A That is right.

Q And what do you examine in connection with the performance of an autopsy? A The entire body.

Q And is that done in accordance with the practice in the office of the Coroner? A Yes.

Q Is that required to be done by you? A That is my duty, to perform an autopsy. An autopsy is a post-mortem which is an examination of the deceased in any way which seems indicated.

Q In connection with that, do you note any irregularities of any organs or portions of the body which you observe while doing the autopsy? A Yes.

Q Did you do that in connection with the autopsy on the body of Edward Howard? A Yes.

Q And is that record which you have produced
321 such a record of what you did in connection with the autopsy? A It is.

Q And it is an official record of the Coroner of the District of Columbia, is that correct? A That is right.

* * * *

323 MR. HORNING: Ladies and gentlemen of the jury, I will read the coroner's autopsy card which has been received in evidence as Exhibit 11.

(Defendant's Exhibit No. 11 previously marked for identification was received in evidence with the exception of the part noted.)

MR. HORNING: "No. 15-883. Place, D. C. Morgue; date March 24, 1948; hour: 12:30 p. m.

"Name: Edward Howard.

"Color: White. Age: 43. Weight: 155. Height: 6 feet 1 inch. Sex: Male. Previous history: Fully clothed.

"The head and face was crushed in the antero-posterior diameters (almost flattened) with marked diminution of all bones with loss of fragments of the skull and brain tissue. (Apparently run over by a heavy vehicle.)

The left ventricle was slightly hypertrophied and
324 the coronaries atheromatous. Heart otherwise normal.

"The lungs were normal.

"The liver was saddle colored, swollen, and mildly fibrotic.

"The kidneys were congested and moderately sclerotic."

BY MR. HORNING:

Q Doctor, do you have in front of you a copy of the report? A I do.

Q Which I just read so that I can hold this and you can follow it? A Yes.

Q When you say the "left ventricle was slightly hypertrophied", in language we laymen can understand, will you explain what was meant by that?

MR. REILLY: Just one minute.

If Your Honor please, without me repeating my objection every time, may it be understood that my objection goes to anything along this line other than the cause of death and I won't have to repeat it?

THE COURT: Yes.

THE WITNESS: Slightly enlarged. Incidentally, the heart is divided into the right and left side and the left ventricle is the lower portion and that was slightly enlarged.

BY MR. HORNING:

325 Q Is that an unusual situation? A No.

Q (Reading) "And the coronaries atheromatous", what does that mean? A The word "atheromatous" means the deposit in the wall of the vessel of masses of solidified fat-like material to which is given the name atheromatous. The thing that you would understand is probably similar to cartilage or gristle.

Q When you say the "coronaries", what does that mean? A The coronaries are the arteries which supply the heart itself. They are called "coronaries" because they encircle the top of the heart and seem to resemble a crown and are called "coronaries".

Q Then the notation "heart otherwise normal", what

is the effect of these abnormalities that we have just been talking about?

* * * *

326 THE WITNESS: There should have been no appreciable effect.

* * * *

327 Q When you said the effect would be none, what do you mean, Doctor? A That they would not be appreciable to the individual or to an examiner.

Q In other words, could those abnormalities have been detected, say, through the use of a stethoscope? A Probably not. They could have but probably not.

Q Would those abnormalities have any effect upon the duration, say, of life or health or anything of that sort? A I can't answer that.

Q Directing your attention to the notation, "The liver was saddle colored", what do you mean by that, Doctor?

A That is was tan or light brown.

Q Is that a departure from normal? A That is a marked departure from normal.

Q What is the color of the normal human liver? A Deep maroon.

328 Q And when it is saddle colored, what does that indicate to you as a physician? A That the liver is diseased.

Q What kind of a disease, Doctor? A Well, there are many diseases which will cause the liver to become discolored; infection of various organisms, bacteria, viruses, amoeba and other protozoans that invade the body; absorption of chemicals, either accidentally or directly, accidentally by employment where they are inhaled or absorbed through the skin or taken as medicines, certain drugs and chemicals will cause the liver to become discolored; certain toxemias, that is secretion of certain poisons in the body due to normal procedures; malnutrition, starvation, excessive use of alcohol. That is all I can think of right offhand.

Q And when you said it was swollen and mildly fibrotic, what did that mean, Doctor? A The normal liver presents a rather sharp edge when it is looked at and a swollen liver does not present that sharp edge. In other words, the examiner will look and when the edge is rounded, he will describe it as being swollen or markedly swollen or whatever the degree of difference or abnormality might be.

Fibrotic means that the normal liver tissue has been supplanted by lesser grade tissue, fibrous tissue, and
329 that too is an abnormality.

* * * *

330 Q Doctor, directing your attention to the notation "the liver was saddle colored, swollen, and mildly fibrotic", when you say that what disease did that indicate to you that the decedent had in his lifetime? A Cirrhosis.

Q Would you tell us what is cirrhosis of the liver? A Cirrhosis of the liver is a group of symptoms characterized by swelling, then enlargement and the invasion of the liver by substances of lesser value than the normal liver tissue, fat and fibrous tissue. With that, the cells that line little canals that run through the liver become swollen and exclude either partially or entirely the flow of bile from the liver and this damming back of bile by this process is what gives this liver this unusual or abnormal color and the whole scheme or the whole picture is described as cirrhosis.

Q And what are the causes of cirrhosis of the liver? A The ones that I just mentioned, invasion of the organism, bacteria or protozoa.

MR. REILLY: May they be elaborated upon? The last word I don't know.

THE WITNESS: Protozoa, is that the word you mean?

MR. REILLY: First you said bacteria.

THE WITNESS: The difference is that bacteria
331 are vegetable and protozoa are animal organisms. Chemicals taken either directly as drugs or taken

accidentally because of exposure, one way or another; toxemias. The word "toxemia" means poison in the blood stream. Toxic arising from normal procedures in the body, things occurring during normal procedures; malnutrition which is improper intake of food; alcoholism which is excessive use of alcohol. I think that is all I can think of offhand.

BY MR. HORNING:

Q Doctor, could that condition be detectable, say, on examination by another physician?

MR. REILLY: What kind of an examination? I think that is too broad, sir.

MR. HORNING: Let's say a manual examination or a visual examination.

THE WITNESS: No.

BY MR. HORNING:

Q And in order to definitely diagnose the condition of cirrhosis of the liver, what is necessary to be done, Doctor? A Well, that would depend on the state of advancement of the disease. Liver disease does not manifest itself very early. It can be well advanced before any symptoms occur. Ordinarily, a person presenting himself for examination, unless some clue is given the doctor that would lead him to suspect liver disease, the probability is that it will not be discovered. In other words, rather advanced liver disease can be present without any symptoms being present that can be elicited other than by laboratory examinations.

Q Specifically, in this decedent, could this condition of the liver, cirrhosis, be present without manifesting itself, say, to him? A Yes.

MR. REILLY: By "to him", you mean the decedent?

MR. HORNING: To the decedent, yes, or to a physician casually examining him.

THE WITNESS: That is right.

BY MR. HORNING:

Q Are there recognized tests by which cirrhosis of the

liver can be definitely detected? A Yes.

Q Would you tell us about those tests? A I don't think I can. There are a great many. However, I can name a few. Where a liver disease is suspected, the blood is examined for the products of the liver. They should be present in a certain normal amount. Where disease is present, that amount is either increased or diminished, according to the disease.

One test is by the detection of bile in the blood
333 called the icterus index. Bile has a pigment, a reddish-brown pigment and because it is in bile and reddish brown, it is called bilirubin. Then there is the Vandenberg test which is a test to determine the bilirubin in the blood and that will indicate disease of the liver.

The liver has to do with the digestion of sugar so a glucose tolerance test is made and that, in turn, will indicate difficulty in the liver.

I am afraid that is as far as I can go. There are about maybe 20 tests to determine liver disfunction.

* * * *

334 Q Doctor, first of all is this condition of cirrhosis of the liver likely to affect the span of life? A Well, I can't answer that. If it progressed, became worse, yes. It is a fact that a great deal of liver damage can occur and a complete cure can be brought about. What would have happened, I am unable to say. I can't answer whether it would have affected his span of life. It would depend on what would have happened.

* * * *

339 Q Doctor, what is the effect upon the human body of an alcoholic content in the blood of .23 percent alcohol? A An individual with that much alcohol would be drunk, ordinarily.

Q And what is the equivalent of .23 percent of alcohol in the blood respecting quantity of alcohol?

THE WITNESS: Now, an hour before that, that is, the individual who produced that specimen an hour before that may have had more but at the instant that specimen was taken it had .23 percent. An ounce of alcohol
 340 will produce about .04 percent alcohol so, in this instance, about 6 ounces of alcohol would be required to produce .23 percent of alcohol in the blood.

Six ounces of alcohol and whatever was in it will have to be computed, whether it was 100 proof or gin—

BY MR. HORNING:

Q Six ounces of alcohol is equivalent to how many ounces of 100 proof whiskey, say? A Twelve.

Q With a drink like gin, for example, which is less than 100 proof, about, say, 80 proof or thereabouts, how many ounces of that fluid would have to be consumed in order to produce .23 percent alcohol in the blood? A Well, 80 proof gin is 40 percent by volume of alcohol. I don't know if I am enough of a mathematician to compute it.

MR. REILLY: It would be 20 percent more?

THE WITNESS: Yes, it would be another ounce or two or three.

MR. REILLY: Eighty hundredths is 20 percent, isn't it?

THE WITNESS: Yes.

Q Doctor, showing you Defendant's Exhibit No. 17, are you familiar with that form? A Yes.

342 Q Doctor, is that form a request by the Coroner to the Health Office for a chemical analysis for alcoholic content in the blood? A That is right.

Q Of a decedent? A That is right.

Q Upon whom an autopsy is performed? A Yes.

Q Is that sent in the regular course of your business to the chemist at the Health Department? A
 343 That is right.

Q And then following that, is the form returned to your office?

* * *

345 Q Would you explain that, Doctor, what is the practice of the Coroner after the sample of the blood is taken from the decedent, and then what happens.

* * *

THE WITNESS: In the autopsy room there is provided a box of test tubes for the purpose of collecting blood samples. Also, there are corks to stopper them and boxes of Dennison labels.

When a specimen is to be taken, the decedent's name is written on the Dennison label. The label is attached to the tube. The tube is then filled with blood right
346 immediately from the deceased. It is stoppered and placed in a rack that is built to hold that tube. It is kept there until the autopsy is completed when it is placed in the ice box. It is left there until such time as an attendant takes it to the Chemist with the request for the examination.

THE COURT: Also this paper writing wrapped around the tube?

THE WITNESS: It is stuck to it. It is pasted to it.

THE COURT: I don't mean—

THE WITNESS: The Dennison label.

THE COURT: I mean this writing, Exhibit No. 10.

THE WITNESS: No; that goes with the specimen. On the top part of that is the name of the deceased, his age, his race and other data with the request, with the name of the specimen, what the specimen is and what is requested of it.

THE COURT: Is that wrapped around the tube?

THE WITNESS: No.

THE COURT: That goes separately?

THE WITNESS: It goes with the tube but not wrapped around it or attached to it in any way.

THE COURT: But at the same time the tube is delivered, this request from you is delivered?

THE WITNESS: That is right.

THE COURT: And that is on Exhibit No. 10?

347 THE WITNESS: That is right.

THE COURT: I see.

BY MR. HORNING:

Q And then Exhibit No. 10 is returned to your office under the conditions that you have told us about? A That is right.

* * * *

Cross Examination

BY MR. REILLY:

Q Doctor, showing you what has been marked Defendant's Exhibit No. 11, which was the autopsy card, I believe, that indicates that the deceased was six feet one inches tall— A That is right.

Q Forty-three years of age and weighed 155
348 pounds? A Yes.

Q The name on it is Edward Howard. At one time, the entry was on Exhibit 11, of April 24, 1948. That was scratched out, was it not, and then March 24, 1948, put thereon? A That is right.

Q I think you also produced certain records from the Office of the Coroner which indicated how the deceased was dressed, is that correct? A That is right.

Q He had on a gray felt hat? A May I see my copy?

Q Yes. A I made no record of his clothing. That is not my record.

Q It is the record kept in the usual course of business at the Coroner's Office, is it not? A That is right.

Q Under your supervision and direction? A That is right. That is a property record.

Q See if I am reading correctly; a gray felt hat? A That is right.

Q Gray overcoat? A Right.
 349 Q Blue dress coat? A Right.
 Q Brown trousers? A Right.

Q Blue dress shirt? A Right.

Q Brown necktie? A Right.

Q Black shoes? A Right.

Q Black socks? A Right.

Q And underwear. That was done on March 23, 1948, was it not? A That is right.

Q Your records also indicate, do they not, that the deceased was identified by his brother, Dr. William J. P. Howard? A No. That is not the identification. That individual gave the information concerning the deceased, to wit, his name, his address, how long he had been in the District; married, single and whatnot. This information here (indicating) was furnished by J. P. Howard, "Information furnished by".

Q Dr. William J. P. Howard? A That is right.

* * * *

350 Q Doctor, coming back to the point of having taken blood from a decedent's body, as your record indicated you did here, did you personally take the blood from the deceased's body? A I don't remember.

Q Do you recall who was present when that was taken? A No, sir.

Q Do you recall whether a man by the name of Rooney was present? A I know Rooney was an employee at the Morgue at the time but I have no specific recollection of his having been present.

Q Do you recall whether Dr. MacDonald, the Coroner, himself was present? A No.

Q When the blood was taken from the body of the deceased, it was placed in a vial? A That is right.

Q Do you recall who placed it in a vial? A No.

Q Do you recall where it was placed after it
 351 was put in the vial? A I have outlined what the general procedure was and I will have to assume

that that was followed in this case.

Q Would it be given to an attendant at that time? A No. It is left there until the work is completed upstairs where the autopsy is done.

Q Normally, the autopsy is done on the second floor of the morgue building, is that correct? A That is right.

Q Over at Nineteenth and Pennsylvania Avenue or something like that, Southeast; just outside of Gallinger Hospital, is that correct, sir? A That is right.

Q Where is that vial taken from the second floor of the Morgue until its next destination? A It is left there.

Q Where is it taken from the autopsy room? A To the refrigerator on the first floor.

Q How is it carried from the autopsy room to the refrigerator, Dr. Rosenberg, if you recall? A By an attendant in a rack that is constructed to hold these tubes.

Q How many tubes may be contained in the rack that you speak of? A I think a dozen.

352 Q Twelve? A I think so.

Q And are they sealed on the top? A No.

Q And when they are taken from the autopsy room to the refrigerator, do they remain in the refrigerator until they are taken to the District Chemist? A That is right.

Q Do you recall in this instance how long it remained in the refrigerator until it got to the District Chemist? A No.

Q Do you recall in whose possession it was from the time it left the Morgue until the time it got to the Chemist? A No.

Q Where is the Chemist located? A In the Municipal Center.

Q Right across the street? A That is right.

Q Do you have any independent recollection of this vial at all in which the deceased's blood was placed? A No.

Q Do you recall when this was taken from the District Morgue to the Chemist's Office? A No, sir.

Q Do you know whether it was taken that day?
353 A No, sir.

Q Do you know whether it was taken the succeeding day? A No, sir.

Q Who took it, if you know— A I don't know.

Q From the Morgue to the Chemist's Office? A I don't know.

Q You did not? A I didn't, no.

Q Who, at the Morgue, would have taken it customarily from the Morgue to the District Building? A One of the attendants who would be on duty there.

Q How many attendants do we have at the Morgue?
A Six or seven.

Q And any one of those six or seven would have taken it? A That is right.

Q Do you recall, Doctor, whether or not when blood is taken from the deceased and placed in a vial that vial had any name on it in this instance, Doctor? A I have no recollection of this instance, specifically.

Q All right. Tell me whether or not now that refrigerator is locked overnight? A It is not locked
354 at all.

Q Are the specimens locked? A No.

Q And put under lock and key at any time? A No.

Q Have they ever been put under lock and key? A Not to my knowledge.

Q Customarily, how long does it take for a specimen between the time the specimen is taken from a deceased and delivered to the Chemist, if you know? A Probably a maximum of 12 hours.

Q Do you know when this particular specimen was taken? A No.

Q You know you took it or somebody took it some time around 12:30 p.m.? A That is right.

Q What time did you finish that autopsy, if you recall, sir? A I don't recall.

Q Would it take as much as two hours? A It might.

Q Three hours? A I don't believe so.

Q Would you deliver it at 2:30 or 3 o'clock in the p.m. or have it delivered from there to the Chemist's Office? A That would depend. If it was only one
355 there, the probability would be that it would be left until the next day when there would be other material to go.

Q Do you know how many specimens were sent from the Morgue to the Chemist on March 25, 1948? A No, sir.

Q Do you know if any were sent on that day, sir? A No, sir.

Q Do you know if any were sent on the afternoon that you made the autopsy, sir? A No, sir.

Q Do you have any independent recollection of that being returned or any memorandum having been returned on this specimen which you sent? A No, sir.

Q Coming down to this .23 percent of alcohol, I think you said that would take approximately—that would be approximately six ounces of alcohol, as such? A That is right.

Q Tell me what effect on the percentage of alcohol in the blood, Dr. Rosenberg, does normal breathing and living for about an hour or so have? Let me put it this way: I am cold sober at 8 p. m. I then am found an hour and a half later dead and between that time somebody finds .23 percent alcohol in my blood. How much intoxicating liquor would I have consumed in the period
of an hour and a half? A Assuming that it is
356 100 proof, 12 ounces.

Q Would oxidation—have I got the correct word? A Oxidation.

Q Have any effect on it? A Yes.

Q What is oxidation? A Burning up of alcohol. Alcohol is converted into carbon dioxide and water.

Q What is the result of oxidation? A As far as alcohol is concerned, if you drink and there comes a time

when you stop, the alcohol is gradually oxidized and you become sober.

Q Within a period of one hour, Doctor, what would be the effect of oxidation or alcohol in the blood? A About an ounce.

Q An ounce? A An ounce would be oxidized in an hour.

Q In a period of an hour and a half, an ounce and a half would be oxidized? A That is right.

Q So if you found .23 alcohol in the blood and the party had to drink that within a period of an hour and a half, he would have oxidized one and one-half ounces of alcohol, is that correct? A As I understand
357 you, this man begins to drink at 8 o'clock and in an hour and a half he is found with .23 percent alcohol?

Q Yes, sir. A All right. Now, he didn't start to drink until 8 o'clock?

Q He could not have started until 8 o'clock. A No. That is your point, is that right?

Q He didn't start until 8. Let's make it ten minutes after 8. A I don't think we can assume that the individual in question took 12 ounces of whiskey and consumed it at one fell swoop, one swallow so that the fact that he was found dead an hour and a half later after a certain period of time would not, of necessity, mean that he had burned up six ounces of alcohol in that hour and a half. Go around the other way: If he had .23 percent and he had been an hour and a half without drinking anything, then you would have to add six to the .23.

Q I didn't get that last, Doctor? A If he had had no drinks for an hour and a half and was living and then .23 was found in his blood, you should add .06 to the .23.

Q How much alcohol would .06 be? A An ounce and a half.

Q Or three ounces of whiskey? A That is
358 right.

Q Or 20 percent more if it was 80 percent proof. Doctor, a person with .23 alcohol, you stated, would be drunk? A Probably.

Q Would be quite drunk, wouldn't he? A There is a variance in the effect of alcohol but the average individual with .23 would be quite drunk.

Q How would that drunkenness manifest itself, sir? A Ordinarily, individuals with that much are flushed, very liable to be loud or boisterous or belligerent. They can also be just the opposite.

Q Does the amount of whiskey or alcohol that one takes into their system have a different effect upon a casual drinker or an occasional drinker than it would upon those who drank steadily? A Well, the effect of alcohol is different in different people. It is also different in the same person at different times. There is a terrific effect of the same amount of alcohol on individuals.

Q Isn't it true, Doctor, that one or two drinks of whiskey may make someone feel pretty good who is not used to drinking? A It might make them drunk.

Q And wouldn't have any effect at all on those who drank consistently?

* * * *

359 A Well, as I tell you, basically you have got to accept the fact which I believe everyone is aware of, the effect of alcohol is terrifically variable, both in the same individual at different times and in different individuals. Hard drinkers have established a tolerance. By that is meant they build up a facility for oxidizing alcohol. Their facility for handling it after it is absorbed is something else and most authorities are agreed that the variance, where these people drink these quantities without effect, is in the oxidation. However, when it is absorbed, the effect produced is on the spinal cord,

360 on the brain. Whatever is in there, will, within rather close limits, have the same effect.

Q How about an empty stomach? Will that have any effect? A Yes, that even hastens the rapidity with which the alcohol is absorbed.

Q Let's assume that this man or a man was on his way home to dinner. Would any of that alcohol have absorbed between the hours of 8 and 9:30 p.m.? A Surely. If he is alive, every instant he is alive the process is going on, both of absorption and oxidation.

Q And that would, as you indicated a moment ago, only show that he had partaken of more than 12 ounces? A I don't believe I said that. I said that if it could be established that this man, in whom the .23 percent alcohol was found, if it could be established that he had not had a drink for an hour and a half prior to his death, then we would have to add .06 to what was found.

Q What would be the effect upon the system, Doctor, of, say, continuous drinking during the period of an hour and a half? A Get drunk.

Q Would it increase or decrease the alcoholic content of the blood? A Increase it.

Q Increase it? A Certainly.

361 Q Up to the point where you had 12 ounces of whiskey in your system, is that correct, 100 percent proof? A We have .23. That is the figure that we have and I have to accept. In accepting that figure, I am basing my answers on it.

Q Do you recall the size of the test tubes that we were talking about a few moments ago or that are normally used at the Morgue to take blood samples? A I believe they are 20 cubic centimeters.

Q With reference to this fountain pen (indicating) isn't it like that? A I have one in my pocket. I thought I would be asked that. Here (indicating) is the vial and here is the cork.

Q How much blood is put in there? A It is filled to about half an inch of the top.

Q How tight is that cork sealed? A Tight enough to prevent it leaking. Q Is there any absorption? A No.

Q Wouldn't that depend on how long it would be saved?

MR. HORNING: I am sorry. You are carrying on a private conversation.

THE WITNESS: Yes, there would. There would
362 be some absorption over a period of maybe months.

It would be an infinitesimal amount at the outset but not anything measurable over a short period.

Q Doctor, you spoke about the liver being "saddle colored". Do you mind taking a look at my shoes, sir, and see if that is what you mean by "saddle colored"? A No. I would say tan or light brown. I would say that is dark brown.

Q It would be several shades lighter? A Yes. That is an expression of mine. This here (indicating) is my record and when I read that I know exactly what it means to me and I can explain it to you.

Q Is it as light as this instrument I have my hand on? A Yes, it would be a little lighter than that.

Q Light tan or light brown—the wrist band that I have on? A That is about right.

Q Is that about the color? A That is right.

Q Does the time between death and autopsy have any effect on the color of the liver? A No.

Q Not at all? A Not if it is done within a reasonable length of time. If it was left for several days or
363 a week, decomposition might set in and alter the structure.

Q Doctor, I think you have stated this—but out of an abundance of caution I want to ask—do you have any independent recollection at all as to how long the speci-

men taken from Mr. Howard's blood remained in the rack? A No, sir.

Q From the time it was taken until the time it was delivered to the Chemist? A No.

Q Do you have any recollection at all of this, Doctor: Whether or not at the same time you sent from the District Morgue to the Chemist, you also sent a specimen of blood taken from a man by the name of Edward Hamlin?

A No, sir.

Q You have no recollection of that? A I have no independent recollection about this case except what I have stated as to the condition of this man's head.

MR. REILLY: That is all.

MR. HORNING: Just one question.

Redirect Examination

BY MR. HORNING:

Q Mr. Reilly asked you about the measurements of the height of the decedent. How is that measurement made? A There is a stick or several of them at 364 the Morgue. They are one inch square and about eight feet long. At one end, there is a one arm of a T that goes out about five inches. The stick is calibrated in inches and the right angle portion is placed on the top of the deceased's head and the other placed at his heel and the fellow looks at what number he has and that is written down as the height.

Q This stick in this case, by reason of the condition of the head, would that make any material difference on the measurement? A Well, the measurements are accurate within an inch cubic in width. They are not done by a caliber. The man looks at it and approximates it within half an inch. This man, with this badly deformed head, certainly there may have been an inch or two deviation in his height due to his injury. In other words,

he may have been only five foot eleven and this says six feet one.

MR. REILLY: Why just five foot eleven?

THE WITNESS: Why did I say it?

MR. REILLY: Yes.

THE WITNESS: I haven't the slightest idea.

MR. REILLY: Didn't you use a ruler to measure the man?

THE WITNESS: Yes.

THE COURT: Don't get mad.

THE WITNESS: I am not mad. I never heard the figures five foot eleven.

365 MR. REILLY: Why did you put six foot one?

MR. WITNESS: Because the man who measured it said "six foot one".

MR. REILLY: Did anybody ever tell you that Mr. Howard was five feet ten?

THE WITNESS: Someone said there was evidence that this man was five foot ten.

MR. REILLY: I have no further questions, Your Honor.

* * * *

366 *Percy C. Duvall*

was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. HORNING:

Q State your full name, Officer. A Percy C. Duvall.

Q Speak louder for the reporter, please. A Percy C. Duvall.

Q What is your occupation, Officer? A Metropolitan Policeman, corporal, attached to the Accident Investigation Unit.

* * * *

Q You were so employed on the evening of March 23, 1948, when a fatal accident occurred at Connecticut Avenue and McKinley Street, is that right, Officer?

367 A I was.

Q I show you the official file which has been produced under a subpoena and direct your attention there to your rough notes. Could you tell me Officer, what time it was you arrived at the scene and by what means? A We received a radio call at 9:32 p. m. As I recall, we were down on the lower end of Connecticut Avenue when we received the call so I would say it was somewhere around 10 or 15 minutes after that we arrived on the scene.

Q Will you tell us what you saw when you arrived there and what you did? Just testify from your recollection. If you can't, refresh it by your original notes. A When we arrived on the scene, I observed the body lying to the rear of the bus. The bus' front end was angled out away from the east curb a little bit and, as I recall, the front end was out into McKinley Street.

The body was laying with the head to the west, with the legs more or less in a sitting position and the feet were along the curb or on the curb.

The first thing I think I did was to take photographs before anything was moved. We got on the bus and asked the driver questions as to what did happen there, took down the necessary information for the regular accident form. I believe he stated—if I may refresh my memory on that—the operator told me that he
368 had stopped for passengers; the front end was about 12 feet north of the bus stop, to let off passengers. He said the light was green and he started up and the left rear wheel ran over something. He said he came to a gradual stop, looked out the front door and was told he had run over a man.

Q You have a note there about the wheel? Was it the left rear wheel or what do your notes say? A I

am sorry, I read that wrong. He said he felt the rear wheel run over something, not "left"; felt.

Q Did you make any tests right on the scene, Officer, of the rear doors of the bus? A After I had gotten the information for the report, we got off at the rear door, stepped on the treadle to see that was working properly. Next, I think we had the driver close the front door while we tested the safety edges of the center door, to see that they were working and found that they did work by applying a little pressure to either edge of the safety edge.

Officer Waters arrived on the scene shortly after that. Before the test was made, Officer Waters arrived on the scene. * * *

* * *

369 Q First of all, you mentioned a photograph. Is there in that official file the photograph which you took? A Yes, sir.

* * *

Q Does this photograph, Officer, truly depict the physical things represented thereon? I mean, is it a correct photograph of what you saw there? A That is what I saw when I arrived on the scene, yes, sir.

* * *

370 (Defendant's Exhibit No. 12 previously marked for identification, was received in evidence.)

* * *

Q Before you get to what you next did, may I direct your attention to this photograph and to what appears to be a package right alongside the body of the decedent. Could you tell us what that package was, Officer? A Yes, sir. That was some Dixie cups in a brown wrapper, several columns of them wrapped up in a brown wrapper.

Q By Dixie cups, you mean paper cups of the type

that are here or something similar to that? A Something similar to that, yes.

Q There were several columns of those wrapped up in a brown package? A I don't recall how many. I would say possibly four different columns of them. I am not too positive of that now.

371 Q You started to tell me about your examination of the bus. A Well, we examined alongside the body of the bus and on the door. It had been raining the better part of the afternoon and early part of the evening. It wasn't a hard rain but it was a steady rain. We were unable to find any markings on the bus or the door.

We examined behind the right rear wheel and we found what appeared to be flesh on the splash fender behind the right rear wheel.

We took a measurement of where the body was found. It was 33 feet south of the south curb of McKinley Street. The front end of the bus was out in the intersection. The right front wheel was four feet ten inches out from the east curb, measuring from east to west. The right rear wheel was one foot ten inches out from the east curb.

* * * *

From the point where the body was up to where the rear wheel of the bus stopped, it was 11 feet. We measured the bus stop sign. It was 36 feet south of the south curb of McKinley Street.

We took a measurement of the bus from the front
372 and back to the center of the doors and it was 21 feet.

MR. REILLY: Twenty-one feet from the front of the bus to the rear door, did you say?

THE WITNESS: To the center of the rear door, 21 feet.

* * * *

373 Q Did you make any investigation of any scheduled buses that were eastbound on McKinley Street at that intersection? I think there is a memorandum in that file. A I believe I called to check on that from No. 8 later on.

* * * *

THE WITNESS: I have it marked here. I
374 had forgotten it. It is the Pinehurst Circle bus.

THE COURT: Is there any dispute about that?

MR. REILLY: I don't think so. I will stipulate there is an eastbound bus that crosses Connecticut Avenue on McKinley Street going east and stays on McKinley Street. I know it goes out McKinley but whether it stays on McKinley, I don't know.

* * * *

Cross Examination

BY MR. REILLY:

Q Mr. Duvall, you have been examining that record. Will you see whether there is anything in there which indicates that the deceased was a passenger on that bus or not, if you know?

MR. HORNING: I will object unless it was of his own personal knowledge.

MR. REILLY: You went into rather a detailed examination as to the records.

THE WITNESS: There was nothing in my record that would indicate that.

* * * *

377 Q I show you Defendant's Exhibit No. 2 and ask you, please, whether or not that bus stop indicated thereon is 36 feet south of the south curb of McKinley Street? Is that what you meant when you said that the bus stop was 36 feet south of the south curb? A That is what I meant; the sign, yes, sir.

Q And the body of the deceased, Mr. Duvall, was found approximately three feet north of that, is that correct, when you said it was 33 feet south of the south curb of McKinley Street? I am sure that is what you said, sir? A That is right.

Q Showing you defendant's Exhibit No. 12 which is a picture of the body of the deceased, can you tell us, please, and, because it is covered over I can't tell, where the feet are and where the head is. A The head is in here (indicating) and the feet are over there (indicating).

Q And I think you said the feet were in sort of a doubled up position? A I said the legs were in sort of a sitting position.

Q Did you notice whether the feet of the deceased were up on the sidewalk or whether they were touching that part of the curb that goes down to the street? A I would say they were on the curb.

* * * *

378 Q I think you said you tested the safety edges by applying a little pressure to them? A Yes, sir.

Q Did you push on the outside of that door at all? A The outside of the door, no, sir.

Q Did you push only on the safety edges? A Put my fingers between the rubber and pushed first one side and then the other.

Q As you pushed to one side, what happened? A The door would open.

Q Was the front door opened or closed at that time? A The front door was closed at that time, sir.

Q And when the front door was closed, you pushed to the right and it opened? A Either way, either the right or the left.

Q And then to the left, it opened? A Yes.

Q Do you recall how far you pushed to the right or the left? A It didn't require too much pressure.

Q Do you recall what part of the door that you
 379 inserted your fingers in and we will let you take
 the picture to see if we can help you somewhat
 on it. A In between this (indicating). I put my fingers
 between the rubber safety edges. One-half of that goes
 with the front door and the other half goes with the back
 door. There is some play between the little electric sen-
 sitization device in there and the edge of the rubber so
 you have to push a little bit to contact that.

Q Was that, I understood you to say, approximately
 the middle of the door, and I am speaking of the lower
 edge? A Where it was comfortable for me to reach
 out.

Q When you reached out, did you reach out from the
 curb or did you reach out from the pavement and, by
 that, I mean the street, or do you recall? A I was
 very probably on the curb.

Q All right, sir. You also testified that the driver
 said that he stopped for passengers. Do you mean by
 that he told you that he stopped for passengers to get
 on or get off the bus, do you recall that? A I know he
 said several passengers got off the bus.

Q Did he tell you how many got off? A Several.

* * * *

386

John Vingua,

was called as a witness by the defendant and, being
 first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. HORNING:

Q State your full name, please, sir. A John Vingua,
 V-i-n-g-u-a.

Q What is your occupation? A I am Assistant
 Chemist in the Washington, D. C. Health Department.

* * * *

Q Were you then so employed on March 24, 1948?
A I was.

Q I show you a document which has previously been identified as Defendant's Exhibit No. 10 for identification. Do you recognize that document, sir? A I do.

Q Will you tell us what it is, sir?

* * * *

387 THE WITNESS: It is a copy of our report to the Coroner in connection with a chemical analysis we made for the Coroner's office.

* * * *

388 Q Did you make it yourself, sir? A Yes.

Q Was it accurate? A Yes.

* * * *

Cross Examination

* * * *

390 MR. HORNING: I now read Defendant's Exhibit No. 10. At the top of it is Case No. 15-883. Date March 24, 1948.

"To Health Officer, District of Columbia. From Coroner, District of Columbia.

"Subject: Request for chemical analysis in the case of one, name, Edward T. Howard; color, white; age, 43; sex, male. Address 5604 Nevada Avenue, Northwest.

"Specimen, blood. Determination—alcohol."

Signed "A. Magruder MacDonald, M. D., Coroner, District of Columbia."

On the bottom of the form: "To Coroner, D. C.—from Chemist, Health Department, D. C.

"Subject: Result of chemical analysis in the above case; specimen—blood Result: Alcohol .23 percent."

This is signed N. E. Young, Chemist, Health Department, D. C.

* * * *

BY MR. REILLY:

Q Mr. Vingua, I think you testified a moment
391 ago that you received or your office received a
specimen from the Coroner's office? A That is
right.

Q And that was blood? A That is right.

Q Do you recall what date that was received? A
No; but I have the record in the Coroner's book right
here.

Q Will you examine it and see what day it was re-
ceived? A It was 9 a. m., March 25, 1948.

Q How many specimens did you receive at that time?
A There were three.

Q Will you give us the names—that were indicated on
those specimens? A George Windsor; Edward Hamlin
and Edward Howard.

Q Edward Howard only? A I said "Edward Ham-
lin and Edward Howard."

Q It wasn't "Edward T."—it was "Edward How-
ard"? A That is the way it was written up here. On
the report, it is different.

Q Give us the second name. A Edward Hamlin.

Q How is it spelled? A In the book "H-a-m-l-i-n".

Q Were those three specimens received at the
392 same time? A They were.

Q Who delivered those at the office? A The
name "Rooney" is signed to those three specimens.

Q Would that indicate that Mr. Rooney brought them,
Mr. Vingua? A Yes.

Q Let's take the first one that you have. A George
Windsor.

Q George Windsor. Did you make an analysis of the
alcoholic content of his blood? A I did.

Q What did it show? A I will have to look that up.
"George Windsor; blood for alcohol .14 percent.

Q Let's take the name Edward Hamlin that you just
gave a moment ago? A "H-a-m-l-i-n."

Q "H-a-m-l-i-n"? A That is right. "Blood for
alcohol: alcohol negative".

Q What do you mean by "negative"? A We could not detect any appreciable amount of alcohol in his blood.

Q The third one you had under the name "Edward Howard"? A That is right.

Q And that you marked alcohol .23? A That is right.

Q Do you know what time of the day, sir, that analysis was made? A I can't tell you from memory in which order those three specimens were run. They were run that day, that I can assure you, but the exact time we ran them I don't recall.

Q Were they run at about the same time? A No; one at a time.

Q When you finish one, then you do another? A Then we start another.

Q Did you do those three personally? A I did all three of those analyses.

Q Do you recall in what sort of a container the blood was? A In a test tube.

Q You don't recall, I think you said what time you made it? A No, I don't.

Q Do you know what happened to the specimens when they were delivered to the office from the Coroner's office? A They were put in our refrigerator. We have a refrigerator, a double door affair. It is a big refrigerator and one side is used exclusively for police specimens and the other side is used for Coroner's specimens and it can be locked and it is locked when we are not in the laboratory.

Q Do you recall, Mr. Vingua, how many specimens were in there that day? A No, I don't.

Q Did I understand you to say the refrigerator was locked? A No. We lock it when we are not in the laboratory.

Q Who is in the laboratory? A At that time, there was Mr. Young, myself and Mr. Valaer. He is no longer working with us. He is out in Cincinnati.

Q Where is the refrigerator with reference to the laboratory? A Well, our laboratory is a little difficult to describe. It is walled off from the rest of the building by blocking one corridor and there is a double door from the corridor leading into this laboratory which has two rooms on the left-hand side as you come in from the short hallway. Then the laboratory is an open space on two sides of that corridor. There is no wall separating them. Then about 25 further down it branches off into two rooms on the left and three rooms on the right.

Q Let me put it this way— A And there are two refrigerators there side by side.

* * * *

395 Q Do you recall these three specimens being delivered personally, Doctor? A No, I couldn't recall them personally.

396 Q Do you know where they were, of your own personal knowledge? A I know where I got them from.

Q You got them from the refrigerator? A That is right; the top shelf in the refrigerator.

Q How many specimens did you take out from the refrigerator at that time? A One at a time.

Q How many specimens were in the other refrigerator that you spoke about, the police refrigerator? A The police and Coroner's is the same refrigerator. Only one side of it is reserved for police specimens and the other side is reserved for Coroner's specimens.

Q Do you know where that specimen was from the time it left the Coroner's office until the time it arrived at the Chemist's office? A No, I don't.

Q Do you recall whether the three of them were delivered at the same time, if you know? A They must have been if he wrote them in the book.

Q Not "must have been". Do you know of your own

personal knowledge? A No. All I can go by is the record.

Q Do you recall how those test tubes were marked?

A Each test tube was labelled.

397 Q No. Do you recall how the test tubes were marked? A Each one had a label on them.

THE COURT: Answer yes or no. Do you recall?

THE WITNESS: I know they were labelled, Your Honor, because if they had not have been labelled we would not touched them.

THE COURT: I think the question was how they were labelled, not whether they were labelled. Isn't that correct?

MR. REILLY: Yes, sir.

MR. HORNING: If you can recall how these specimens were labelled—

THE WITNESS: They had a gum label on each one of them with the name of the person.

MR. REILLY: I have no further cross examination, sir.

MR. HORNING: That is all. Thank you.

* * * *

Benedict J. Dulasky

was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

398

Direct Examination

BY MR. HORNING:

Q Your full name, sir, is Benedict J. Dulasky, D-u-l-a-s-k-y, is that correct? A That is right.

Q What is your occupation? A I am a Government employee in the Department of State.

Q The Department of State? A Yes.

Q What was your occupation on the evening of March 23, 1948? A The same.

Q Assigned to the State Department? A That is right.

Q Were you a passenger on a bus which was involved in an accident that night at Connecticut Avenue and McKinley Street? A Yes, sir.

Q Do you recall where you were seated on the bus, sir? A As I recall, it was about three or four seats ahead of the rear door sitting on the left-hand side of the bus.

Q Do you recall the bus when it approached its stop at Connecticut Avenue and McKinley Street? A Well, the only thing I could recall is that it did approach.
399

* * * *

Q Was there anything unusual to attract your attention to the operation of the bus as it approached and made the stop at Connecticut and McKinley that night? A No, sir.

Q Before the bus started away from the stop, did you hear anything, sir? A No; not as it started off, no.

Q When the bus started off, would you tell us what you observed, what you heard, what you did? A Well, I was reading a newspaper and just as the bus started away from the stop, there was a sensation of the rear wheels running over something. It wasn't a sharp object at all. It was just like running over something quite soft, a raised hillock or something; and the bus driver turned around, looking sort of puzzled and slowed down and then some lady in the rear of the bus screamed that a man had been run over. Whereupon, he stopped.

Q And when he stopped, did you do anything then, sir? A Well, I looked around and finally got off the bus.

As I recall, I got off at the rear door and there
400 were quite a few people gathered at the rear of
the bus and then I saw this man laying in the
street near the curb.

Q When you got off of the rear door of the bus, Mr.
Dulasky, was there anything unusual about the operation
of the rear door?

* * * *

THE WITNESS: No, sir.

* * * *

Q Before you got off of the rear door, do you recall
any other passengers similarly preceding you out of the
rear door? A I didn't see anybody getting off but I
heard the treadle. Some people did get off.

Q Then when you got out of that same rear door, did
you go back to see what had occurred? A That is
right.

401 Q What did you see, sir? A Well, there was
a man laying fairly close to the curb on the street,
all sort of doubled up and there was a man in uniform,
I believe an Army officer, was taking the man's pulse. I
stood around there for a minute or two and after the
police came and the ambulances came along, then I just
walked away.

Q Were you able to identify the person who was
injured as having been previously a passenger on the
bus?

* * * *

THE WITNESS: No, sir, I could not.

BY MR. HORNING:

Q Do you have any recollection of any passenger on
the bus carrying a package? A No, sir, I do not.

Q Did you see there at the scene the man who was
injured, did you see nearby a package? A No, I didn't.

Q You don't recall that? A No.

* * * *

BY MR. REILLY:

Q I think you said you were seated three or four seats from the rear of the bus on the left-hand side?

A No. To the best of my recollection, I was three or four seats ahead of the rear door.

Q On the left-hand side? A On the driver's side of the bus.

Q Was anybody sitting next to you or with you up against the window? A I was up against the window. I was all alone.

Q Until this accident happened, nothing unusual occurred at all, I presume? A I didn't notice anything.

Q Do you know whether the bus was crowded? A No, it was not crowded all the way out from town where I got on, not particularly.

Q Do you recall its stopping at Connecticut and McKinley? A That is the Peoples Drug Store there?

Q No, that is where this occurred. A Yes,
403 that is right.

Q Can you tell us how many people got out of the front door? A No, I couldn't.

Q Do you know how many people got out of the rear door? A No, sir.

Q Did you hear the treadle that you speak about? A Yes, sir.

Q In the rear? A Yes, sir.

Q Do you recall hearing people stepping on the treadle? A Well, I heard the treadle going down as people got off.

Q Can you recall about how many times it went down? A Several times.

Q It did go down several times? A Yes.

Q Mr. Dulasky, one other thing: Where did you get on the bus? A I think it was at Twentieth and I.

Q Did you hear any loud or boisterous talking on that bus at any time? A No, sir.

Q Did you hear anybody making themselves noisy on that bus at any time? A No, sir.

404 Q Did you smell the odor of alcohol on that bus at any time? A No, sir.

MR. REILLY: That is all.

MR. HORNING: That is all. Thank you.

* * * *

Roy Judson Burroughs

was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. HORNING:

Q What is your full name, Mr. Burroughs? A Roy Judson Burroughs.

Q What is your occupation, sir? A I am an economist in the Department of Agriculture.

Q How long have you been so employed? A Since 1944.

Q Were you a passenger on a bus of the Capital Transit Company on the night of March 23, 1948, which had an accident at Connecticut Avenue and Mc-
405 Kinley Street? A That is right, sir.

Q Will you just tell His Honor and the ladies and gentlemen of the jury what you observed, what you saw respecting this whole transaction? A I was sitting as a single passenger on the left-hand side of the bus immediately opposite the rear door. The bus came to a stop at McKinley and Connecticut Avenue at a time when there was some rain late in the evening. Two women passengers got off at the rear door. I don't know whether anyone else got off of the bus but I do

know there were two women who got off of the bus at the rear door.

The door closed. The driver started up. It is my impression there was a slight scratching some place on the right side of the bus. Some passenger in the rear of the bus, some man called out to the driver, after the bus had advanced perhaps five or six feet; called out something to the effect he had hit a man or perhaps run over someone, or something. Whatever the call was, it stopped the bus.

The bus driver then opened the doors. Passengers got off. I stepped off of the right rear door myself, being immediately adjacent to it and turned back to the victim of the accident.

This victim was a man who was lying behind the bus, perhaps five or six feet, with his legs parallel to the curb and in an "L" shape, with his body so that he was lying on his left side facing out Connecticut Avenue toward Chevy Chase Circle. The bus had run
406 over the man's head, apparently, because it was badly crushed and there was a package of some sort, as I recall, just off the curb, a manila sack that was somewhere near the man.

I felt of his pulse. It seemed that there was a very slight flicker, though I could not be sure. As I was stooping over feeling of the man's pulse, an Army doctor came along and asked me if I were a physician and I told him no, that I was not. He said, "Well, I am", and I said, "This is your case."

Other people, a few others, gathered around and finally the bus driver came up and I asked him if he had called an ambulance or called the police and he said "No." I suggested that he do that and that he get the names of the passengers. He then rushed over and I presume made his calls and came back and took the names of those who were present.

I waited a few moments until an elderly police officer

came and took charge of the situation and, there being nothing more I could do, having given them my name, I walked up the street to take my connecting bus.

Q I think you said you were seated directly opposite the rear door? A Yes, sir.

Q And you saw two ladies get off the bus? A
407 Yes, sir.

Q Did you see any gentleman get off the bus behind them? A No, sir.

Q Did you see anyone getting off the bus carrying a package such as you have described? A No; I didn't see any such person.

Q A man carrying a manila sack or envelope or something of that sort? A No.

Q Did you observe the rear doors close before the bus started? A Yes, the doors were closed.

Q Did you see anyone in close proximity to the rear doors when the bus started? A No, sir.

Q You were looking right at the rear door? A I was looking—I don't know where.

Q Can you describe how the bus, after the doors closed and it started, can you describe how it started? A It started in a normal slow fashion to pick up speed after having come to a stop. There was nothing unusual about it. Then it stopped very quickly because I presume, after the man called, I think the driver must have stopped in a matter of inches; just a very, very short distance. At least, he must have been going very slowly to have done that.

* * * *

408 Q Did you have any sensation or feel anything at or about the time that the man called out? A Yes. My description was inadequate in that regard. Just after the bus started, there was a feeling as though the right rear wheel had bumped, gone over something. It felt very much like going over a curb and, at that

point, the driver paused, heard nothing; no one said anything and then he started to proceed again. It was then that we heard the call.

My memory slipped on that intermediate pause.

Q And I think you said that you exited by that rear door. You got off of that rear door of the bus? A I did, yes, sir.

Q Right after the bus operator had brought it to a stop? A Yes, sir.

Q Did you observe anything unusual about the
409 operation of the rear door at that time? A No, sir.

Q Do you recall whether other passengers on the bus similarly exited by that rear door? A I believe I was the first one out of the rear doors and I presume the people behind me got off at the rear door.

Q At least you experienced nothing unusual when you exited from the rear door? A I observed nothing unusual, no, sir.

Cross Examination

BY MR. REILLY:

Q Where did you get on the bus, sir? A I believe I got on downtown. It could have been at some intermediate point.

Q Was it somewhere south of Dupont Circle? A Well, I think it was at least as far down as Florida Avenue where sometimes I make a transfer.

Q Do you recall if the bus was crowded? A At the time of the accident, there were comparatively few people; I would say maybe a dozen people on the bus, although I don't know.

Q You don't have any distinct recollection? A I know it was not crowded because there was no one sitting beside me.

410 Q Do you recall how many people were on the bus after the accident? A No.

Q You have no recollection of that at all? A No.

Q Do you recall how many people got off the front door of the bus at Connecticut Avenue and McKinley Street at the time or before the accident? A No; I don't know what happened in the front.

THE COURT: You mean before the accident?

BY MR. REILLY:

Q At the stop just immediately prior to the accident?

A I don't know who got off at the front. I simply know the two who got off at the rear.

Q Which way were you facing, sir? A I was facing in the direction the bus was moving out Connecticut Avenue.

Q Do you recall whether you looked to your left or toward the west? A The door is to the right.

Q Did you look out toward the west at all? A I don't know whether I looked that way or not. I do know I observed the two women to my right.

Q Was there anything unusual about the exit of the people at that time that would mark it on your
411 memory so that you can recall it right now? A
No.

Q Are you sure that only two got off? A Others could have gotten off. I do know there were two women who got off.

Q Others could have gotten off? A Others could have gotten off. I didn't observe anyone else.

Q There wasn't anything particularly unusual that called your attention to it at all, was there, at that time?

A No; just a normal bus stop.

Q Do you know how many got off at the bus stop just immediately south of that stop from the rear door?

A I don't recall, sir.

Q Do you know where the bus stop is immediately south of McKinley? A I think there is a stop two blocks below McKinley.

Q Do you recall how many got off the front or the rear there? A I don't, sir.

Q Do you recall how many got off, we will say, at Connecticut Avenue and Calvert Street as the bus was coming out? A No.

Q Do you recall any single stop between Du-
412 pont Circle and Connecticut Avenue and McKinley Street? Was there anything about any of those stops that invited itself particularly to your attention?

A The only thing that is etched on my mind is the one stop that resulted in the accident.

Q And prior to the accident, there wasn't anything particularly about that that etched itself on your mind, isn't that correct, sir? A No.

Q Did you smell the odor of alcohol on that bus at all prior to the accident? A Not prior to the accident. I did smell something after I got off.

Q After the accident? A After I got off and felt the body.

Q Did you hear anybody being obstreperous and making any noise on that bus at all prior to the accident?

A No, sir; everything was quiet and normal.

* * * *

415 Q Mr. Burroughs, do you recall whether the side windows of the bus on the night in question were misty? A There had been some rain and it was a gloomy evening.

Q And that somewhat impeded your view to the left anyhow at the moment, did it not? A I don't have any recollection of what I saw on the left.

Q Could you see out of the right side of the
416 bus? A One would be looking into the dark at that point. It would be fairly dark. There was a street light nearby but I don't know what one would see.

Q Could you see outside of the door after it was

closed? A I think one would see anything through the window of the door, that is, if anyone were close to it.

Q Do you recall seeing outside of the door? A No, sir.

Q I think you said you heard a scratching at the door? A I heard it as the bus started.

Q Just as it started? A Just as it started, I have the impression that I heard just a slight scratching on the side of the bus. That is just a faint impression. I am deaf, as you see. I may not have picked it up.

* * * *

Redirect Examination

BY MR. HORNING:

Q I think you said, in answer to one of Mr. Reilly's questions, that you smelled alcohol on the body of the person who was in the accident? A At the time I went to the victim, there was a distinct odor of alcohol present, yes, sir.

Q You got close enough to him to smell it? A
417 I was feeling of his pulse.

* * * *

Morris Katz

was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

* * * *

Q Your full name is Morris Katz, is that correct sir?
A That is right.

Q What is your occupation? A Retail liquor store.

* * * *

418 Q With reference to the Washington Terminal shops, where was your store? A Directly across the street.

* * * *

Q In his lifetime, did you know Edward T. Howard who was killed in an accident by a Capital Transit bus?

A Yes, sir. I have known him as a customer coming in the store once in a while.

Q Did you see him on the evening of March 23, 1948?

A That was the night that he got killed? I did, yes.

Q Where did you see him? A He came in the store that night.

Q Into your liquor store? A Yes, sir.

Q Did he make a purchase there? A Yes. I sold him a half a pint of gin.

* * * *

419 Q Specifically, did you sell him any Dixie cups or paper cups? A No, sir, I never did.

* * * *

420

Cross Examination

BY MR. REILLY:

Q Was Mr. Howard sober when you sold him a half pint of gin? A Was he what?

Q Sober? A Yes, sir, positively.

Q Do you recall what time of the evening it was? A It was some time after 8 o'clock in the evening. It was late.

Q Was there anything about him at all that indicated he was drinking? A No, sir, not a bit.

Q You said the Washington Terminal shop is
421 across the street from you? A That is right, sir.

Q In distance, how far is that? A Well, it is quite a distance. I wouldn't like to give an exact estimate.

Q First of all, you have to cross New York Avenue, do you not? A That is right, and then you have quite a lot of ground. The track is there before you get to the Roundhouse. It is quite a long distance.

Q Is that as much as half a city block? A Yes, definitely.

Q Is it more than half a city block? A I imagine it would be. It would be a city block pretty much.

Q Between— A Our store and the Roundhouse over there.

Q Where he was actually employed? A That is right.

* * *

422 (Thereupon the testimony of Lyle Harris Edelbute given at the Coroner's inquest at the District Morgue, Washington, D. C., on March 5, 1948, was read to the jury, as follows:)

"Thereupon,

"Lyle Harris Edelbute

423 "was called for examination as a witness and after first having been duly sworn by the Coroner, testified as follows:

"Examination by the Coroner

"Question: Your full name—

"Answer: Lyle Harris Edelbute.

"Question: Member of the Medical Corps, United States Army?

"Answer: Yes, sir.

"Question: Are you on duty at Walter Reed Hospital?

"Answer: Yes, sir.

"Question: And, Doctor, directing your attention to Tuesday night, did you have occasion to examine a pedestrian, one Edward Thomas Howard, on Connecticut Avenue?

"Answer: Yes, sir, I examined him, sir, personally.

"Question: Tell the jury what you learned in your examination.

"Answer: Do you want the medical aspects of that?

"Question: Yes, sir.

"Answer: I found the man who was so extensively injured as to be incompatible with life.

"I will go into the details of that if you care to have any—

"Question: Please.

"Answer: There was severe compression of the
424 skull with exclusion of part of the brain contents almost, well, not complete, almost complete innucleation of the eyes, extensive hemorrhage. Also at that time checked the pulse, although, I don't know that that enters here, found none, no respiration in approximately five minutes that I was there with him.

"Question: Then you pronounced him dead?

"Answer: When the police came I stated that I was qualified to pronounce him dead, and he was dead.

"Question: Where was this body when you examined him?

"Answer: This body was a few feet—I couldn't tell you exactly how many—behind the stopped bus, lying near the curb at the corner of Connecticut Avenue and McKinley Street, Northwest.

"The Coroner: Any questions by the jury?

"(None.)

"The Coroner: Mr. District Attorney?

"Examination by the Assistant United States Attorney

"BY MR. GRADY:

"Question: Were you on the bus?

"Answer: I was a passenger on the bus.

"Question: Had you seen the man on the bus?

"Answer: I don't recall having seen him on the bus.

Of course, I was unable to recognize him, if I did,
425 afterwards.

"Question: Where were you sitting in the bus?

"Answer: I was sitting in, probably, the second or third seat on the left from the front of the bus.

"Mr. Grady: I have no further questions.

"The Coroner: Mr. Johnson.

"Mr. Johnson: No questions.

"The Coroner: Mr. Reilly.

"Examination by Mr. Reilly:

"Question: Did you feel the bus go over him, sir?

"Answer: Yes, sir.

"Question: About how long after the bus started up?

"Answer: As I recall, it was immediately, or almost immediately after the bus started. I would say that the bus had moved more than 10 or 12 feet. It might have been moved one or two.

"Question: Do you know what caused the bus to stop? Were there any screams of that nature?

"Answer: No, sir. The impact was noticeable all over the bus immediately thereafter when the driver opened the door.

"Question: Was there an impact before the bus went over him?

"Answer: There were two impacts, the second following very closely upon the first, the second one being somewhat louder and more pronounced.

"Question: Do you know what part of the bus struck him?

"Answer: I didn't see the accident occur. I was on the bus. I can assume that it was the hind wheels it felt as a passenger on the bus, as if it were the right hind portion of the bus, although I wouldn't have no idea, not having seen it.

"Question: The first impact, Doctor, did that indicate the source in the rear of the bus?

"Answer: I felt that it was the rear of the bus. Of

course, I wasn't aware at the time I felt those until a moment or two after, probably the same time as the driver, that it was truly an accident, and I am reporting this the best as I can recall them.

"The Coroner: That is all, sir.

"Thank you very much. You may be excused, Doctor."

MR. HORNING: That is the defendant's case. The defendant rests.

MR. REILLY: I have just one or two questions of Mrs. Howard and then the plaintiff rests.

Thereupon,

Mary Margaret Howard,

the plaintiff, resumed the witness stand and, having been previously duly sworn, testified in rebuttal as follows:

427

Direct Examination

BY MR. REILLY:

Q Mrs. Howard, how much did your husband weigh at the time of his death, do you know? A He wasn't a very large man; I would say around 135, 140.

THE COURT: I can't quite hear you. Did you say 135 pounds?

THE WITNESS: I would say about 135 or 140 pounds.

BY MR. REILLY:

Q How tall a man was he? A He was approximately five feet ten.

Q Before you answer this question wait until Mr. Horning can make an objection.

Did you have an automobile at the time of his death?

A No.

MR. HORNING: No objection to that.

MR. REILLY: Doesn't make any difference?

MR. HORNING: No.

BY MR. REILLY:

Q Do you recall someone from the Police Department identifying himself as Mr. Waters calling you a day or two after the accident? A Yes; a police officer called.

Q Will you relate what the conversation was
428 relative to a bottle of gin, if you recall? A Yes.

He said Mr. Howard had a half pint of gin in his pocket and I believe he wanted to know—I think his question was “Why would he have a half pint of gin in his pocket?” as far as I recall. My reply to that was he may have been bringing it to me because we thought perhaps some people would be dropping in to see the baby; that we would have company.

MR. REILLY: That is all.

Cross Examination

BY MR. HORNING:

Q Mrs. Howard, were you in court when Sergeant Waters testified? A Pardon me?

Q Were you in court when Sergeant Waters testified? You were in court yesterday when Sergeant Waters testified? A Yes, I was.

Q And Sergeant Waters read from his notes of his conversation with you.

MR. REILLY: I object.

MR. HORNING: You heard him testify to that, didn't you?

MR. REILLY: What he said, I have no objection to.

BY MR. HORNING:

Q Do you recall that yesterday when Sergeant Waters was asked about this, he said that he would read
428 A from his notes which were made and he then sat where you are and read from his notes the conversation which he had with you on the day after the accident occurred? Don't you recall that? A Yes.

Q Didn't the Sergeant testify to just what his conversation was with you?

MR. REILLY: Don't answer that. I object to that. The best evidence we have got before the Court and jury is what he did say. I don't think he can now say "Did he say that?"

THE COURT: Overruled. You may answer.

THE WITNESS: Well, the question again, please?

MR. HORNING: Will you read the question, Miss Rawls?

(Thereupon the pending question was read by the reporter.)

THE WITNESS: Yes.

BY MR. HORNING:

Q Was that the correct testimony respecting his conversation with you? A Well, I didn't quite agree with all of it. I believe I said more than the Sergeant had taken down.

Q Didn't you tell him in that conversation that your husband was a machinist at Washington Terminal? A Yes.

Q That was true, wasn't it? A That is right.

429 Q Didn't you tell him that he usually got off at 5 p.m.? A That would have been his regular quitting time.

Q I can't hear you. A That would be his regular quitting time if he didn't work overtime.

Q Didn't you tell this Sergeant in this conversation that you husband got off from work at 5 p.m.? A Yes.

Q That was the truth, wasn't it? A That was the truth.

MR. REILLY: I object to this.

BY MR. HORNING:

Q Didn't you tell the Sergeant that your husband worked overtime last night? A Yes.

Q And that it was his custom to take a Chevy Chase

Circle bus and if an eastbound bus was in, then he would take that to Nevada? Didn't you tell him that? A Yes, if there was one convenient.

Q Didn't the Sergeant ask you about the Dixie cups?

A Yes.

Q And didn't you tell him that the Dixie cups were for home use? A Yes.

430 Q Didn't you tell the Sergeant that your husband was bringing gin home to you? A No, not in those words.

Q Pardon? A Not in those words. Those were not the words that I used. I would not know that Mr. Howard was bringing gin home, in the first place and what I said was it was that he may have been bringing it to me in the event somebody happened to come by and visit or to see the baby.

Q That is what you told the Sergeant? A That is what I told the Sergeant.

Q Not that your husband was bringing gin home to you? A That is right.

Q I think you testified before that you don't use gin? A That is right.

Q And there wasn't any reason why your husband would be bringing gin home to you, was there? A No.

Q And you hadn't asked him to bring any gin home to you, had you? A No.

Q You hadn't made any plan for any celebration which required the use of a half a pint of gin, had you? A No.

Q When, prior to the death of your husband, 431 had you last weighed him? A Had I last what?

Q Weighed him? A Weighed him—I don't recall exactly. As a matter of fact, I wouldn't weigh him. He would probably get on the scale in the drug store if he were out walking in the evening.

Q You don't remember prior to the accident whenever

you saw his weight recorded? A I couldn't tell you exactly.

Q When you testified just now about his weight, you were guessing, weren't you?

MR. REILLY: I object to that.

THE WITNESS: I said about 135, 140 pounds.

BY MR. HORNING:

Q That was your guess about it, was it not? A He was slightly heavier than myself.

Q I say that was your guess? A Yes.

MR. REILLY: I object to the use of the word "guess".

BY MR. HORNING:

Q When you testified about his height, that similarly was a guess, wasn't it? A No. We measured each other several times.

Q When did you last measure him? A It was something that went on all the time. The children were
432 interested in height.

Q When was the last time prior to the accident that you last measured your husband? A I couldn't give you the day or hour.

Q Could you give me an approximation? A It might have been three or four weeks before.

Q How would you do it? A We remove our shoes, stand against the wall and mark the top of the wall and measure it with the yardstick from the top on down.

Q Did you do it frequently? A Yes.

Q Was his height varying from time to time? A No. I said it was the children's idea.

MR. HORNING: That is all. Thank you.

Redirect Examination

BY MR. REILLY:

Q And you had been measuring the height of growing children from time to time? A Yes; and they always

wanted to know what their father's and mother's height was, that is right.

Q Mr. Horning asked you about Dixie cups. Did you use Dixie cups around the house? A Yes. The children always used them when they had their little friends
433 in.

Q For what purpose? A Well, for drinking limeades and cokes, things like that.

Q The things that children normally use? A Yes.

MR. REILLY: That is all. No further questions.

MR. HORNING: That is all.

* * * *

MR. REILLY: No further testimony.

* * * *

(Thereupon the jury left the courtroom.)

MR. HORNING: If Your Honor please, at this time I wish to renew my motion for Your Honor to di-
434 rect a verdict in this case. The ground of the motion is that, as stated previously at the conclusion of the plaintiff's case, the evidence now shows overwhelmingly that the accident could not and did not happen in the manner in which it was contended by the plaintiff.

* * * *

442 THE COURT: The motion is denied.

* * * *

474 (Thereupon, at 12 o'clock noon, the jury retired to consider of its verdict.)

* * * *

475 (Thereupon, at 4:15 o'clock p.m. the jury returned to the courtroom and the following proceedings were had:)

MR. HORNING: May we approach the bench?

(Thereupon counsel approached the bench and the following proceedings were had:)

(Discussion off the record.)

MR. HORNING: I want to object to the granting of the Allen Charge in a civil case. I think this case has been thoroughly presented by both sides. All of the evidence is in and any charge designed to coerce a settlement would not be in the interests of justice in a civil case.

THE COURT: I will have to overrule your objection.

MR. HORNING: Yes, Your Honor.

(Thereupon counsel resumed their places at the counsel table and the following proceedings were had in the hearing of the jury:)

THE COURT: Members of the jury, I have received this note from your foreman, Mr. Callahan, in which Mr. Callahan states:

"The jury is not able to agree."

This case has been before you on five days, including today. It is true you have not devoted the whole of each day to the case on every day because of the opening ball game, which was postponed, and MacArthur's day adjournment but, in a sense, it was a rather protracted

case and I am going to give you an instruction
476 which has the approval of the Supreme Court of the United States and I want you to listen attentively and to consider it and return to your jury room and deliberate further after I give this instruction to you.

The jury is instructed that, in a large proportion of cases, absolute certainty cannot be expected; that although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his fellows yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it is their duty to decide the case, if they can conscientiously do so; that they should listen with a disposition to be convinced to each other's argument;

That if much the larger number are for the plaintiff, a dissenting juror should consider whether his views, which

make no impression upon the minds of so many jurors, equally intelligent as himself, are correct.

If, on the other hand, the majority are for the defendant, the minority ought to ask themselves whether their views are correct, which are not concurred in by the majority.

So you will return to the jury room, deliberate further in the light of these additional instructions.

* * * *

480 (Thereupon, at 4:30 o'clock p.m. the jury retired to consider further of its verdict.)

481 (Thereupon, at 4:50 o'clock p.m. the jury returned to the courtroom and the following proceedings were had:)

THE CLERK: Mr. Foreman, has the jury agreed upon its verdict?

THE FOREMAN: Yes.

THE CLERK: How do you find, for the plaintiff or for the defendant?

THE FOREMAN: We find for the plaintiff.

THE CLERK: And in what amount?

THE FOREMAN: \$10,000.

* * * *

BRIEF FOR APPELLANT

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 11,170

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED OCT 9 1951

CAPITAL TRANSIT COMPANY, *Appellant,*

Joseph W. Stewart
CLERK

v.

MARY MARGARET HOWARD, Administratrix of The
Estate of Edward T. Howard, Deceased, *Appellee.*

**Appeal from the United States District Court for the
District of Columbia**

GEORGE D. HORNING, JR.,
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810 Colorado Building,
Washington, D. C.
Attorneys for Appellant.

HOGAN & HARTSON,
Of Counsel.

QUESTIONS PRESENTED

1. Whether a verdict should not have been directed in appellant's favor when the evidence established that its bus door had no defective mechanism which would have permitted appellee's decedent to have caught and restrained his body or clothing as was contended by appellee.

2. Whether there was error in giving a supplementary charge urging agreement by the jury:

- (a) When the case involved was a civil one;
- (b) When the language used contained inadequate caution that a juror's conscientious convictions should not be surrendered;
- (c) When the charge was given hastily after a short period of jury deliberation and was followed quickly by a verdict in the maximum amount.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,170

CAPITAL TRANSIT COMPANY, *Appellant*,

v.

MARY MARGARET HOWARD, ADMINISTRATRIX
OF THE ESTATE OF EDWARD T. HOWARD,
DECEASED, *Appellee*.

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLANT

Jurisdictional Statement

This appeal is from final judgment in a bus accident civil action following a jury verdict in favor of the plaintiff. Jurisdiction of this Court to hear the appeal is based upon U. S. Code, Title 28, Section 1291. The complaint, answer

and final judgment appear on pages 2, 4, and 11, respectively, of the joint appendix.

Statement of Case

Appellee, who was plaintiff below, sued appellant, Capital Transit Company, under the District of Columbia wrongful death statute for Ten Thousand Dollars pecuniary damages to the next of kin resulting from a fatal accident to Edward T. Howard on March 23, 1948, when deceased was allegedly alighting as a passenger from appellant's bus in Washington, D. C. (App. 2). Acts of negligence asserted by amended pretrial order were failure to keep proper lookout, premature starting of the bus, and the catching of decedent's clothes or body in the means of egress managed and controlled by appellant (App. 9).

On the trial, appellee's theory was that decedent had been a passenger on the bus. No one identified the decedent as having been seen on the bus. One lady passenger, who had herself descended from the rear door and walked several steps away, looked back and saw the decedent on the outside facing the bus and clutching the door with his right hand (App. 21). She concluded that he was caught in the door of the bus (App. 21) but could not see what part of his body or clothes were caught (App. 22). There was nothing unusual in the operation of the door when the witness and other preceding passengers had alighted (App. 24). As far as she knew, the witness was the last person to get off the bus (App. 30).

An unopened bottle of gin was found by the police in the decedent's overcoat pocket (App. 55). A chemical analysis of decedent's blood showed an alcoholic content of .23 percent (App. 144). A medical expert testified that "an individual with that much alcohol would be drunk, ordinarily" (App. 124). An expert explained that mechanically the rear bus doors are operated by the weight of an alighting passenger on the treadle, that the brakes are automatically applied and the accelerator peddle cannot be depressed, the

bus operator having no control until the doors have fully shut (App. 92-93); that the sensitive edge in the center of the doors sounded an alarm, lighted up a signal on the dashboard and prevented application of power in the event solid matter came between the edges of the door (App. 93); an object less than an inch and a half in diameter within the sensitive edge area when the bus moved would either be carried away, if loose, or would slide out, if rigidly attached (App. 96). No repairs were made to the door in question for over nine months after the accident, and the bus was in service during this period (App. 99). Company records of routine inspections fifteen days prior to and fifteen days after the accident showed no defects nor repairs (App. 108). Police had immediately tested the treadle and sensitive edge at the scene of the accident and found nothing unusual about the operation of the door (App. 111). An inspection of the bus by the District of Columbia Department of Motor Vehicles on the morning after the accident revealed nothing defective in connection with the rear doors of the bus (App. 115). Neither the passenger who alighted from the rear door prior to the accident nor the two who alighted immediately thereafter observed anything unusual about its operation (App. 24, 150, 155).

Appellant's motion at the close of the evidence for a directed verdict, on the ground that the evidence overwhelmingly showed the accident could not have happened as contended by appellee, was denied (App. 168). Appellee's counsel acquiesced (R. 448, 451, 454, 455) in the trial court's narrowing of the issues to the following (R. 450):

Plaintiff claims that the driver was negligent in starting the bus before the decedent had safely alighted therefrom and that such negligence proximately caused the decedent's clothes or some portion of his body to be caught within the means of egress from the bus and that decedent was dragged or was thrown under the bus to his death.

The defendant claims it was not negligent as alleged and contends that plaintiff's intestate was not on the bus, had not alighted therefrom, did not have any por-

tion of his clothes or body caught within the means of egress from the bus; but that, by reason of a mind befogged with alcohol, he walked into the side of the bus after the bus started to pull away from the intersection, or attempted to open the rear doors of the bus after they had been closed and after it had started and fell under the right rear wheel.

With the court's subsequent charge in the foregoing terms (R. 469-470), appellee's counsel announced his satisfaction (R. 474).

At twelve o'clock noon, the jury retired to consider its verdict (App. 168). At 4:15 p.m. the jury returned (App. 168), having previously sent in a note from its foreman stating (App. 169):

"The jury is not able to agree."

Appellant's counsel objected to a proposed supplemental charge upon the ground that coercion of a settlement through such a charge would not be in the interests of justice in a civil case (App. 169). Nevertheless, the court stated to the jury as follows (App. 169-170):

* * * I am going to give you an instruction which has the approval of the Supreme Court of the United States and I want you to listen attentively and to consider it and return to your jury room and deliberate further after I give this instruction to you.

The jury is instructed that, in a large proportion of cases, absolute certainty cannot be expected; that although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it is their duty to decide the case, if they can conscientiously do so; that they should listen with a disposition to be convinced to each other's argument;

That if much the larger number are for the plaintiff, a dissenting juror should consider whether his views, which make no impression upon the minds of so many jurors, equally intelligent as himself, are correct.

If, on the other hand, the majority are for the defendant, the minority ought to ask themselves whether their

views are correct, which are not concurred in by the majority.

So you will return to the jury room, deliberate further in the light of these additional instructions.

At 4:30 p.m. the jury retired and at 4:50 p.m. returned to announce its agreement on a verdict for appellee in the full sum of Ten Thousand Dollars (App. 170). Appellant's subsequent motion for judgment n. o. v. or a new trial (App. 12-13) was denied (R. 498).

Statement of Points

1. The Court erred in failing to grant appellant's motion for a directed verdict made at the close of all the evidence since the proof established that the rear doors were working properly and that the edges could not have caught and retained the decedent's body or clothing.

2. The Court erred in giving a supplemental charge designed to impel the minority jurors to agree with the majority.

Summary of Argument

1. Appellee's case was pitched upon the theory that some portion of the decedent's body or clothing was caught in the door of the bus as he was alighting. However, no one identified appellee's intestate as having been on the bus. The conclusion of the witness Molly Gates, that decedent was caught in the door of the bus was mere surmise as his back was toward her, she merely saw him clutching from the outside of the door with his right hand, and she admitted that she could not see what part of his body or clothing was caught. The evidence was that the door operated perfectly both before and after the accident, that the mechanism was such that the bus could not be started with any object caught in the door large enough to touch the sensitive edge, and further that a smaller object would slip out as the bus moved. In this state of the evidence appellant's motions for a directed verdict and for judgment n. o. v. should have

been granted as there was a failure to prove any defect in the mechanism with respect to which negligence was charged.

2. The giving of the supplemental charge over appellant's objection after the jury had failed to agree was error. The so-called "Allen charge" from which the instruction given was adapted raises a serious question of impingement upon the exclusive function of the jury in any type of case. The Allen charge was originally given and later approved in criminal cases. It bears upon the criminal case inquiry into the "reasonableness" of a doubt. Its effect is to lighten somewhat the criminal prosecutor's burden of convincing "beyond a reasonable doubt" each member of the jury. Plaintiff's burden in a civil case, however, is the far lighter task of persuasion "by a fair preponderance of the evidence." Thus, in a civil case the Allen charge renders a light burden still lighter. It is far more difficult for a defendant to prevail on disputed questions of fact in a civil case than in a criminal case because of the known propensity of jurors to be less frugal about taking away someone else's money than about taking away his liberty.

Moreover, the court in admonishing the minority to question whether his "views" are "correct" (terms not appearing in the Allen charge) alters the general principle that the burden is on the plaintiff to convince the jury by a "fair preponderance of the evidence" of defendant's liability. A civil juror is under an obligation to find for the defendant unless convinced by a fair preponderance of the evidence that plaintiff's contentions are established; something very different from asking himself whether his own "views" are "correct" because a majority of his fellows appear to have been convinced. In contrast to the case from which the Allen charge was said by the Supreme Court to have been "taken literally", the charge given in the instant case omits entirely reference to the burden of proof and the effect if the individual juror retains a question as to whether the burden has been sustained. This omission has the tendency to make

the effect of the charge as given more imperative than the original model. Its efficacy is clear from the fact that the jury went out to its room, decided liability, fixed the amount of the damages and returned to the court room within twenty minutes.

This Court has never in a civil case approved the Allen charge. Even in criminal cases, reservations have been expressed as to the practice of giving it. Frequent reference has been made to ameliorating language of the trial judge relative to the individual's duty not to surrender his conscientious convictions—expressions not to be found in the charge here given.

Finally, even if the charge were correctly used in civil litigation, even if accurately phrased and prudently circumscribed, the charge was too hastily employed. It came at 4:15 p.m. when the jury had received the case only at noon, and when it had presumably lunched for a considerable period during this interval. The practice of hastening the judicial process at the sacrifice of the litigants' rights should be emphatically stopped now and in this case where the effect of the supplemental charge is apparent.

Argument

1. Appellant was entitled to a directed verdict because the evidence failed to establish any defective door mechanism which would have rendered possible an accident in the manner claimed by appellee.

The extremely narrow issue upon which appellee's claim rested was whether the rear door of the bus was properly functioning on the occasion of the decedent's accident. This is illustrated by the following colloquy (R. 480):

THE FOREMAN: Your Honor, I don't know if this is proper but we want to know if we have to find negligence on the rear door only on that point, negligence of the company on the door itself only.

THE COURT: On those three points only. You are not to consider it from the standpoint of a pedestrian being run down.

THE FOREMAN: No, I mean negligence on account of the rear door only.

THE COURT: Negligence in connection with the door?

THE FOREMAN: That is what I wanted to know.

THE COURT: That is all there. There is no evidence to the contrary.

Anything wrong on that?

MR. HORNING: That is all.

MR. REILLY: That is all right.

THE COURT: You cannot speculate on something else that you see.

The issue being thus narrowly confined, it remains only to see what the evidence showed as to the condition of the door on the night of March 23, 1948.

On March 8, 1948, a regular mileage inspection was made which included check of the air compressor, brakes, doors, door operating mechanism, and air equipment; no defects or repairs were indicated on the company records (App. 108, 109). No difficulty had been experienced with operation of the bus doors on the trip on which the accident occurred (App. 77). The passenger who alighted from the rear doors immediately prior to seeing the accident saw several people alight ahead of her and noticed nothing other than the usual operation of the door (App. 24). Two other passengers alighting immediately after the accident likewise found it operating normally (App. 150, 155). Right at the scene, the police tested the treadle and sensitive edges and found them operating normally (App. 111). The police ordered that the bus be taken to a District of Columbia inspection station the following morning (App. 112). The official inspection there showed the bus to be in good mechanical shape and nothing defective in connection with the rear doors (App. 115). The regular mileage inspection on April 8, 1948, again revealed neither defects nor repairs (App. 108). For over nine months of regular service following the accident, no replacements or repairs relating to the operation of the door were needed (App. 98, 99). Mechanical devices prevented application of power with any fixed object caught in the center doors (App. 93, 96).

Accordingly, the sum and substance of appellee's proof of a door defect was the testimony of Molly Gates that on a rainy night she glanced back after walking several steps away and from the fact of a man's body being close to the door and his right hand clutching at it (she could not see the other, App. 22), she concluded he was "caught in the door of the bus" (App. 21) although she could not see what part of his body or clothes were caught (App. 22). Her surmise was at most a "mere scintilla of evidence" which would not entitle appellant to go to the jury. *Jackson v. Capital Transit Co.*, 69 App. D. C. 147, 99 F. 2d 380 (1938); *Kresge v. Kennedy*, 66 App. D. C. 274, 86 F. 2d 651 (1936). In *Brown v. Capital Transit Co.*, 75 U. S. App. D. C. 337, 127 F. 2d 329 (1942), where a passenger contended there was defective maintenance because she fell in leaving a streetcar, a directed verdict was *held* affirmed, the court pointing out that surmise as to the damage being caused by something for which defendant was liable was insufficient.

The closest case in this jurisdiction to that at bar is *Lewis v. Washington Ry. & Electric Co.*, 52 App. D. C. 243, 285 Fed. 977 (1923). There the charge of negligence by an alighting passenger was "based wholly upon the defective condition of the step at and prior to the time of the accident." The Court there said, at 245, 979:

We think the case turns upon the failure of the court to sustain defendant's motion for an instructed verdict. There was a total failure on the part of plaintiff to sustain the allegations of the declaration. At the close of the case, no evidence had been adduced showing a defective condition of the step. Plaintiff herself could only say:

"I remember a distinct feeling of being caught and held back."

This sensation might have resulted from any one of a number of different causes for which defendant could not have been held responsible. The evidence wholly fails to show negligence on the part of defendant; hence there is no theory upon which a verdict for plaintiff

could have been sustained. Such a finding would have been based, not upon proven facts, but upon mere speculation as to how the accident might have occurred. This is not sufficient.

From other jurisdictions the closest factual situation (assuming for the purpose of argument that the decedent was an alighting passenger) is the rear door fall of a street-car passenger in the case of *Frederici v. Atlantic City & Shore R.R.*, 130 N.J.L. 16, 30 A. 2d 820 (1943). In reversing a judgment for the plaintiff, the court said, at 17, 821:

There was also testimony from the defendant that the opening and closing of the doors was not done by manual operation but by an electrical device; that this device had been inspected on January 23d, prior to the accident (which happened on February 8th) and again on February 12th, after the accident, and that the apparatus on these occasions operated properly and required no repairs. The doors are controlled by an electric current which is "set" by the motorman turning a switch in front of the car. The circuit is completed when the passenger steps from the floor of the car to the first step of the exit, when the door opens, and the door does not close so long as pressure, eight to twelve pounds, is exerted on the bottom step. When the passenger's weight is removed from the bottom car-step the door closes in three seconds.

Two grounds of appeal are listed. The first challenges a part of the trial judge's charge as erroneous under the facts of the case and the second asserts an abuse of discretion in refusing to grant a new trial on the question of liability. An exception was taken to the following excerpt from the court's charge:

"You may infer, if you so choose, that aside from any active fault of the motorman, the closing of this mechanically operated door in this instance was unusual in its suddenness, and in the event that you do draw this inference you can find that the defendant company's care over its contrivance did not measure up to that high degree which the law demands that it exercise over its equipment".

Contrasted with this, the negligence charged in the fifth paragraph of the complaint is that the defendant "did so negligently, carelessly and recklessly manage, operate and control its car; to wit, the door of the same reserved for the exit of the plaintiff and other passengers that without signal, warning or indication of any kind it caused the said door to hit, strike, close upon and against the body of the plaintiff," etc. It is therefore clear that the plaintiff's claim is based on the negligent operation of the door. The court said that aside from any active fault of the motorman the jury was privileged to infer that the "closing of this mechanically operated door in this instance was unusual in its suddenness." We find no testimony that the door was closed with "unusual" suddenness. The proof was uncontradicted that the motorman had no control over the opening or closing of the car doors once the electrical device was "set" (*i. e.*, in control of their opening and closing) as it was in this case; and the further testimony of the plaintiff was that she fell on the steps of the car. It is obvious that her weight had not been removed from the steps when she fell. The instruction to the jury, quoted above, was without support in the proofs. It permitted the jury to speculate about the matter. There was no testimony whatsoever of any mechanical errancy in the operation of the door, or any proof of the normal manner of its operation except from the defendant and no testimony to justify the inference that on this occasion it closed in any but the normal manner. To conclude, the complaint charged negligence in general terms in managing, operating and controlling the door. The charge, as challenged, permitted the jury to find negligence on the part of the motorman in closing the door or an errancy in the device for closing the door which could be negligence on the part of the defendant. There was no proof to support the latter proposition and therefore it was error to instruct the jury that they might find the defendant answerable in negligence for it.

The instant case is similar to the *Frederici* case in that there is no proof of an "errancy in the device for closing the door." The cases are dissimilar in that *Frederici* relied

upon negligent operation of the door, whereas in the case at bar counsel admitted that his case must stand or fall upon "negligence on account of the rear door only" (R. 480). As the court said: "There is no evidence to the contrary" (R. 480), and appellee's counsel repeatedly acquiesced (R. 448, 451, 454, 455) in the court's statement that the negligence claimed by the plaintiff was a premature start catching decedent's clothes or body (R. 450). Since the proof was that both before and after the accident there was nothing wrong with the bus door mechanism which would have made possible a premature start with an object held in the door, appellant was entitled to a directed verdict. Death cases, of course, are inherently difficult to divorce from sympathetic reactions. However, hard cases make bad law, and this Court has recently demonstrated its devotion to the law despite strong sympathies for an unfortunate plaintiff. *Keffer v. Capital Transit Co.*, 87 U. S. App. D. C. 13, 14, 183 F. 2d 808, 809 (1950) ("We are compelled to affirm the lower court under such circumstances that we regret we cannot render judgment in favor of the appellant, a young man who has been struck down in the very prime of life.")

2. Appellant was prejudicially affected by the error in giving a supplementary charge directed at the minority jurors after the jury had announced its failure to agree.

Appellant objected to the giving of a supplementary charge after the foreman had sent the trial court a note to the effect that the jury was not able to agree (App. 169). Overruling the objection, the court proceeded to further instruct the jury upon getting together in terms set out at length *supra*, at pages 4-5, and at pages 169-170 of the joint appendix. Thus adjured, the jury retired and within the short space of twenty minutes were back with a verdict for appellee in the statutory maximum of Ten Thousand Dollars.

Appellant earnestly submits that its right to the independent consideration by twelve jurors of disputed facts was

thereby prejudicially affected. The supplemental charge is a prime example of a practice by some, but not all, trial judges in this jurisdiction to pressure the juries to reach a decision. The practice is understandable because of the volume of judicial business, the reluctance to accept a temporary "draw" and the high judicial sanction which it is felt the practice received in *Allen v. United States*, 164 U. S. 492, 501 (1896), a criminal case in which the Supreme Court found no error in a charge summarized therein by it and said to have been "taken literally from a charge in a criminal case which was approved of by the Supreme Court of Massachusetts in *Commonwealth v. Tuey*, 8 Cush. 1, and by the Supreme Court of Connecticut in *State v. Smith*, 49 Connecticut, 376, 386." But considerations of expediency should not overshadow those of justice and the criminal case "Allen charge" is not appropriately applied to civil litigation in the absence of agreement by all counsel concerned. It is aptly said in 1 Branson, *Instructions to Juries* (3d ed. 1936) § 45:

A trial judge has no authority, either by threats, intimidation, undue urging, or inapt suggestion, to affect the fair, conscientious and impartial deliberations of the jury, or to influence the conclusions they are to reach. The fact-finding body of the mixed tribunal should be as unhampered in the performance of their proper functions as the judge is in his.

In the first place, the Allen charge, originating in an 1851 Massachusetts criminal case, followed in a Connecticut criminal case thirty years later and in the Supreme Court *Allen* case forty-five years later, may well be out-dated by the time of its century birthdate. The law has progressed far since recalcitrant juries were hauled about in carts from town to town after the English circuit judges until they perforce agreed. Long experience has tested the worth of jury decisions on matters of fact. Impatience and pressure of business should not be permitted to emasculate the deliberate and conscientious consideration of *all* the jurors by admonitions to the minority in effect to mend their ways. Only

freely reached agreement is true agreement, and that is the sort to which litigants are entitled. In this country it is our pride that the minority are not to be oppressed, that they are not necessarily wrong because a greater number have different views. Theory and experience are in accord that the minority may well be in the right, and if not, the one upon whom rests the burden of persuasion must try again under our system of law. As was said in *Neely v. Travelers Insurance Company*, 141 Kan. 691, 696, 42 P. 2d 957, 960 (1935):

The lone juror, or small minority of jurors, possessing courage to obey the juryman's oath and to withstand dragooning, is the bulwark in the jury system against mob verdicts.

In civil cases, particularly, is there danger of supplementary admonitions toward the minority likely to work mischief. Jurors are understandably reluctant to resolve disputed questions of fact in such a way as to deprive criminal case defendants of their lives or liberty. No such hesitancy is manifest in civil cases about handing out money—particularly that of the other fellow. A charge telling the minority to consider by reason of their mere minority status “whether their views are correct” (App. 170) differs little from the statement that “no juror ought to remain entirely firm in his own conviction one way or another, until he has made up his mind that he is necessarily right, and the others necessarily wrong.” In reversing for these remarks, the court observed in *Cranston v. New York C. & H. R. R. R.*, 103 N. Y. 614, 617, 9 N. E. 500 (1886):

The jurors who were not satisfied by the evidence, of the truth of the plaintiff's allegations, were justified in refusing, for that reason, to find a verdict in her favor, although they might not have made up their minds beyond all question that they were necessarily right, and that those who were in favor of finding a verdict for the plaintiff were necessarily wrong. To sustain this instruction would be to cast upon the defendant, in a

civil action, a burden quite as heavy as that which rests upon the prosecution in a criminal case, and perhaps still more onerous. If the evidence was so clear as to lead to a conclusion with the degree of certainty required by the charge, there was nothing to submit to the jury, and it was the duty of the court either to direct a verdict or to nonsuit the plaintiff.

The distinction between the criminal case test of persuasion beyond a reasonable doubt and the much less difficult "fair preponderance of the evidence" civil case is manifest. From a civil defendant's standpoint, the plaintiff's lighter burden becomes still less heavy. This lighter load when coupled with the more ready facility at giving up a civil defendant's money, as distinguished from a criminal defendant's life or liberty, renders a civil juror's non-acquiescence far less likely to withstand a "get together" charge than that of a criminal case juror.

The charge, as given, omits any reference to the burden of proof, despite the fact that in the model from which the Allen charge derived, *Commonwealth v. Tuey*, 8 Cush. (62 Mass.) 1, 2 (1851) the trial court stated:

In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the commonwealth to establish every part of it, beyond a reasonable doubt; and if, in any part of it, you are left in doubt, the defendant is entitled to the benefit of the doubt, and must be acquitted.

The Allen charge has been by no means universally accepted. Although the civil-criminal distinction is seldom expressed, it is significant that criticisms of the charge are very often found in civil cases. Thus, the court said in reversing *Acunto v. Equitable Life Assur. Soc.* 270 App. Div. 386, 387, 60 N.Y.S. 2d 101, 102 (1946):

The charge given is in accordance with a charge approved by the Supreme Court of the United States in *Allen v. United States*. * * * No case exactly in point in

the State of New York has been drawn to our attention.

There is no unanimity in regard to the propriety of such a charge as this throughout the various States of the United States. The majority rule is to the contrary of the Federal rule as stated in the *Allen* case.

The decision of this appeal should be determined on the basis of general views of policy, as to what is desirable advice to be given in the case of jurors who seem to be unable to come to a decision.

In *St. Louis & S. F. R. R. v. Bishard*, 147 Fed. 496 (C.C.A. 8th, 1906), the supplemental charge involved was:

I want to say to you, gentlemen of the jury, that this has been a very expensive trial to the litigants. It has consumed three days of the court's time, and that in justice to both parties, a verdict should be rendered if possible. The juror who is standing out against the other ten should listen to their arguments and should try and look at the case from their viewpoint. As I charged you and now charge you, you are the exclusive judges of the evidence in this case.

In reversing, the appellate court said, at 502:

The charge itself was not sufficiently guarded. Its tendency was to bring the one juror to an agreement with the others, even against the dictates of his own judgment.

A verdict returned five minutes after the reading of an extract from the reasoning of the *Allen* case in *Chicago & E. I. Ry. v. Sellers*, 5 F. 2d 31 (C.C.A. 8th, 1925) was held reversed as tending too strongly towards coercing the minority of the jury to surrender their honest convictions.

Our own Court of Appeals has never, so far as counsel's research has revealed, approved the giving of the *Allen* charge in a civil case. Even in criminal cases the Court has expressed reservations about its use and when affirming convictions there has usually been additional ameliorating language in the trial court's supplemental charge. Moreover, there has ordinarily been a greater time element both

between initiation of deliberations and the charge, and between the charge and verdict than in the instant case, thus raising questions of the appropriate time to give it and whether there is in fact a demonstrated prejudicial effect from the supplemental charge.

In *Mendelson v. United States*, 61 App. D.C. 127, 58 F. 2d 532 (1932), the jury took the case at 5:30 p.m. April 28, 1931, and the supplemental charge was withheld until 10:30 p.m., April 29th. Even then, the jury did not return its verdict until 12:45 a.m., April 30th. (See No. 5480, R. 66, 67, 68). The reservations with respect to such charges were expressed by Judge Groner, who stated at 130, 535:

While we think it better to avoid, if possible, the practice of supplementary charges to the jury, the matter is one which is not forbidden by absolute rule, and the propriety must, in the nature of things, be left largely in the discretion of the trial judge.

Consent by defense counsel to the giving of the Allen charge after only an hour's deliberation was the dispositive consideration in *Coupe v. United States*, 72 App. D.C. 86, 88, 90, 113 F. 2d 145, 147, 149 (1940). Similarly, lack of objection by counsel coupled with ameliorating language were apparently determinative in *Bord v. United States*, 76 U.S. App. D.C. 205, 207, 133 F. 2d 313, 315 (1942), where in addition to the Allen charge the trial court stated that a juror should not be "bull-headed" and "stubborn." However, the trial judge followed up by concluding that: "If, on the other hand, he does have an abiding conviction one way or the other it is not his duty to surrender to a majority the other way." The Appellate Court stated:

Though the language to which appellant objects is strong, we think the context prevented it from being coercive. Moreover, counsel who represented appellant at the trial did not object to it.

The time element there likewise indicates a judicious restraint in the first instance before the charge and a fifty

minute interval following it prior to return of the verdict. The Record there indicates (No. 8078, R. 46) that the jury first retired at 12:15 p.m., July 31st, that at 11:00 a.m., August 1st the court directed that the jury be brought in and announced that "both counsel in this case and the Court thought possibly it might be of some help to read the Allen charge.

Hoagland v. Chestnut Farms Dairy, 63 App. D. C. 357, 72 F. 2d 729 (1934), is the only local civil appellate case located by counsel in which a supplemental charge was questioned. However, the language used was not that of the Allen case (See No. 6044, R. 112) and, in affirming, the Court quoted at 360, 732, the trial judge's prudent cautions that:

"None of you should return a verdict against your conscientious views," and also, "I think if you can conscientiously get together you should do so."

In the charge involved in the case at bar the casual statement in the body of the instruction that it is the duty of the jury to decide the case "if they can conscientiously do so" was an inadequate preservation of the juror's duty to be personally persuaded by a fair preponderance of the evidence rather than by the majority feeling of his fellow jurors. As the Iowa court said, reversing a defendant's verdict in *Middle States Utilities Co. v. Incorporated Telephone Co.*, 222 Iowa 1275, 1282, 271 N. W. 180, 185 (1937):

The susceptibility of jurors to the influence of the presiding judge should prompt the court to emphasize the thought that the court is not endeavoring to inject his own ideas into the minds of the jurors in reference to the verdict which they should find, and should likewise emphasize that in nothing that is said in the instruction does the court intend or mean that any juror should surrender his own free will and judgment.

Former expression of reservations by this Court concerning the use of supplementary charges having failed to stem the dangerous practice of indiscriminate utilization of verdict urging charges, the best curative measure is to reverse

in the case at bar where the charge's potent prejudicial effect is clear from the brief interval between "Allenizing" the jury and the return of a maximum verdict.

Conclusion

Since the proof of a defective door mechanism upon which appellee's recovery hinged was not produced, appellant was, and is, entitled to judgment in its favor. Moreover, because the supplementary charge given over appellant's objection was not only inappropriate in a civil case but too hastily given, inaptly phrased and inadequately circumscribed, it was manifestly prejudicially erroneous. Therefore, the minimum relief to which appellant is now entitled is a new trial wherein an uninfluenced jury can determine for itself whether appellee has convinced *each* of the twelve jurors by a fair preponderance of the evidence of the negligence she asserts.

Respectfully submitted,

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No. 11,170

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

For the

District of Columbia Circuit

FILED OCT 29 1951

CAPITAL TRANSIT COMPANY, *Appellant,*

Joseph W. Stewart

v.

CLERK

MARY MARGARET HOWARD, Administratrix of The Estate
of Edward T. Howard, Deceased, *Appellee.*

**Appeal from the United States District Court
for the District of Columbia**

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Washington 5, D. C.

No. 11,170

**APPELLEE'S STATEMENT OF THE QUESTIONS
PRESENTED**

In the opinion of appellee the questions presented are:

1. Whether a verdict should have been directed in appellant's favor when there was evidence that the deceased, as he was alighting from a bus operated by the defendant, was caught in the door of the bus and dragged to his death.
2. Whether the Court erred in giving a supplementary charge to the jury suggesting agreement, if it could be conscientiously done by members of the jury.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,170

CAPITAL TRANSIT COMPANY, *Appellant*,

v.

MARY MARGARET HOWARD, Administratrix of The Estate
of Edward T. Howard, Deceased, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

The decedent was killed as a result of a bus accident in the District of Columbia. While a passenger on the bus and alighting therefrom a portion of his clothes or some part of his body was caught in the door. The bus started before the decedent had safely alighted and dragged him to his death. The decedent was survived by his wife and three minor children, who sued under the appropriate statute for damages resulting to them because of the death of the decedent caused by the negligence of the appellant.

Inasmuch as the appellant maintains there was insufficient evidence to submit the issue of negligence to the jury, the appellee invites the Court's attention to the facts presented below. We do not believe they can be adequately condensed in this statement. We invite the Court's attention to *pages 4 et seq, infra*.

The second point raised by appellant is that the trial court should not, in a civil case, give a supplementary instruction to the jury suggesting that the jury agree if it can conscientiously do so.

SUMMARY OF ARGUMENT

The facts presented required submission of the question of appellant's negligence to the jury.

There was nothing in the supplementary charge given by the Court that was contrary to well established principles urging the jury to agree if it could conscientiously do so.

ARGUMENT

I

A Peremptory Instruction to the Jury to Find for the Appellant Could Not Have Been Lawfully Given by the Trial Court.

The Capital Transit Company, appellant herein, maintained below and reiterates here that the trial court was compelled to direct a verdict in its favor. Appellee disagrees.

The case was tried twice. In January, 1951, it was heard before Judge Matthews. The jury disagreed. In April, 1951, the second trial was held before Judge Pine. Verdict and judgment were entered for appellee (App. 11). Appropriate motions for judgment for the de-

fendant were addressed to both trial judges. Each rejected the contentions of appellant. Motions for judgment n. o. v. were entered in both proceedings and were denied in each.

The opinion of Judge Pine was inadvertently omitted from the joint appendix and is in the appendix to this brief. (page 35)

The law relative to when a motion for a finding for the defendant should be granted by the trial court is well settled. If fair minded men might differ upon the evidence presented, including reasonable inferences to be drawn therefrom, the jury must settle the issue. c. f. *Gunning v. Cooley*, 281 U. S. 90, 74 L. Ed. 720, *affmg.* 58 App. D. C. 304, 30 F. (2) 467; *B. & O. R. R. v. Postom*, 85 U. S. App. D. C. 207, 208, 177 F. (2) 53; *C. T. Co. v. Gamble*, 82 U. S. App. D. C. 57, 58; 160 F. (2) 283; *Shewmaker v. C. T. Co.*, 79 U. S. App. D. C. 102, 143 F. (2) 142; *Boaze v. Windridge*, 70 App. D. C. 24, 102 F. (2) 628; *Tobin v. P. R. R.*, 69 App. D. C. 262, 100 F. (2) 435; *Crusade v. C. T. Co.* (*Mun. Ct. App. D. C.*) 63 A. (2) 878, 879.

In *Shewmaker v. C. T. Co.*, 79 U. S. App. D. C. 102, 103, 143 F. (2) 142, this Court said:

"The rule applicable in the District of Columbia on a motion for a directed verdict, in an action founded upon negligence, is that the evidence must be construed most favorably to the plaintiff; to this end he is entitled to the full effect of every legitimate inference therefrom; if upon the evidence, so considered, reasonable men might differ, the case should go to the jury; if, on the other hand, no reasonable man could reach a verdict in favor of the plaintiff, the motion should be granted; a mere scintilla of evidence is not sufficient; the question is not whether there is any evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party upon whom the onus of proof

is imposed; the burden being upon the plaintiff to establish the negligence and injury alleged, if the evidence fails adequately to support either element the motion should be granted. The same rule is applicable on a motion to set aside the verdict under Rule 50 of the Federal Rules of Civil Procedure."

Because the appellant maintains that there was insufficient evidence to submit the cause to the jury for its determination, appellee finds it necessary to recite the facts which we believe required the trial judge to submit the issues to the jury for its determination.

At approximately 9:30 P. M., March 23, 1948, the defendant, who at that time was 43 years of age, was killed by a Capital Transit Company bus at Connecticut Avenue and McKinley Street, N. W., Washington, D. C. He was survived by his wife and three minor children, who at the time of his death were 41, 12, 11 years and five weeks of age respectively. The life expectancy of the deceased and his widow was twenty-six (26) years. The expectancy of life for each child was beyond its majority.

The decedent had been employed by the Washington Terminal Company for a period of approximately twenty-five (25) years. He was steady, industrious and sober. His wages were in excess of \$4,000.00 per year. (R. 122, 123)

The plaintiff claimed:

1. The decedent was a passenger on the bus of the defendant;
2. That while alighting some portion of decedent's clothes or of his body was caught within the doors of the bus. The bus proceeded while decedent was caught in the door, causing him to be dragged forward and under the bus, with resultant death.

The defendant claimed:

1. It was not negligent;
2. That plaintiff's intestate was not on the bus and had not alighted therefrom;
3. No portion of his clothes or body was caught within the means of egress from the bus;
4. By reason of a mind befogged with alcohol, he walked into the side of the bus after the bus started to pull away from the intersection, or attempted to open the rear doors of the bus after they had been closed and after it had started and fell under the right rear wheel.

On the day of death, decedent worked as he had done for a quarter of a century at the Ivy City Terminal of the Washington Terminal Company, which was located near Fenwick and Oakie Streets, N. E., Washington, D. C. On that date he worked from 9:00 A. M. until 8:10 P. M., the last three hours constituting overtime. At approximately 8:10 P. M. he left his place of employment and went to a liquor store about a city block away and purchased a half pint of gin. He was 100% sober when he left his place of employment. (App. 57). He was sober when he purchased the gin sometime after 8:10 P. M. on the day he was killed, and there was nothing about him to indicate he had been drinking (App. 159).

The buses owned and operated by the defendant for public transportation left Fenwick and Oakie Streets, N. E., known as the Ivy City Terminal, which was adjacent to decedent's place of employment, as well as the liquor store, at 8:17 and 8:27 P. M. Those buses arrived at 18th and K Streets, N. W. at approximately 8:44 and 8:54 P. M. (App. 68, 69). They arrived at 20th and K Streets, N. W. at approximately 8:45 and 8:55 P. M. Both locations are transfer points to board buses going north on Connecticut Avenue to McKinley Street, where

the tragedy occurred. The bus terminal was a block beyond. The bus which was involved in the fatal accident was scheduled to pass 20th and K Streets, N. W. at 9:04½ P. M. (App. 69). Connecticut Avenue and McKinley Street was the point or stop closest to the decedent's residence and would be the point where he would alight in order to go home (App. 16).

A man dressed in clothes similar to the clothes found on decedent's body at the time of his death was seen caught in the rear door of the bus when it started. This caused him to be carried to his death (App. 21, 22). He was pulling at the rubber part of the rear door (App. 33). The witness Gates said he had on nondescript clothing, gray or tannish brown (App. 28). The decedent's remains were taken from the scene to the morgue, whose records indicated he was dressed in a gray overcoat, brown trousers, blue dress coat, blue shirt, brown necktie, black shoes (App. 128). The witness Gates testified that as she started to get off the bus a man got up from the left hand parallel rear seat and came toward the door in back of her (App. 23, 24, 25). He was dressed in non-descript clothing (App. 24, 25). Counsel for the defendant in a searching cross examination sought to have her describe the clothing of the man who got up from the rear of the bus as this witness was about to get off. He asked:

“Q. And you cannot describe his clothing?

“A. Other than they they were gray, brownish; non-descript clothing.” (App. 28)

It will be observed that this description of the clothing coincides with the description of the decedent's clothes found on him after he was taken to the morgue, as well as of the testimony of the widow of decedent that when he left for work on that date he was wearing brown trousers, blue coat, and a dark gray overcoat. (App. 16). The witness Gates also testified that no one was waiting

to board the bus at the scene of the tragedy. (App. 21). This was confirmed by the driver. (App. 73)

In reply to the questions by the Court the witness Gates stated that it was raining and that as she got off the bus no one passed her going toward the bus and she did not pass anyone after alighting. (App. 43, 44) To characterize the testimony of this witness as "a mere scintilla of evidence" is inaccurate.

The defendant denied decedent was a passenger and relied upon the fact that death occurred because he was intoxicated and walked into the rear door of the bus. There was no testimony that the deceased was intoxicated save the testimony of Dr. Rosenberg that a specimen of the decedent's blood was taken from his body at the morgue on March 24, 1948 at 12:30 P. M. and sent to the District Chemist for analysis (App. 118). He could not remember whether he personally had taken the specimen (App. 128) or who was present when it was taken. It was placed in a vial in the autopsy room and then taken by an attendant in a rack with other vials (App. 129) to the refrigerator on the floor below. The vials were not sealed, nor was the refrigerator locked. The witness did not know in whose possession the vials were until they were delivered to the District Chemist in the Municipal Center (several miles away) (App. 129). He did not know when it was taken to the chemist from the morgue (App. 129), or by whom (App. 130). It could have been any one of several attendants (App. 130).

On March 25, 1948 the District Chemist's office received three vials of blood from the morgue for analysis (App. 145). Identifications and analyses were as follows:

George Windsor, whose blood showed an alcoholic content of .14 per cent

Edward Hamline, whose blood showed an alcoholic content to be negative; and

Edward Howard, whose blood showed an alcoholic content of .23 per cent.

Dr. Rosenberg then testified that .23 alcohol in the blood would ordinarily make an individual drunk (App. 124). He would have about six ounces of alcohol in his system, or twelve ounces of 100 proof whiskey or gin, or 20% more if 80 proof.

The plaintiff maintained and the jury believed that a mistake in identity or analysis had been made. The deceased was sober when he left work. He was sober when he purchased the half pint of gin and gave not a bit of indication that he had been drinking at the time. He was killed within an hour. His habits were abstemious. He was an extremely hard working family man. Many witnesses testified to his exemplary life and industrious habits (App. 44, 47, 51, 52, 56, 57, 61, 66, 159). The conclusion is inescapable that if no error in the analysis or identification of the vials was made, the alcohol had to be consumed between 8:15 P. M. and the time of his death at approximately 9:30 P. M. He could not have consumed so much liquor except while a passenger on the bus because he had to board it at 8:17 or 8:27 P. M. and probably took the latter. The bus that killed him at approximately 9:30 P. M. was loaded with passengers and none saw anyone drunk on the bus.

Finally, a bottle of gin, similar to that which he bought, was found crushed on his person, with the maker's seal and internal revenue stamps unbroken indicating the bottle had been unopened (App. 54).

The Answer of the defendant admitted that its bus ran over and killed the deceased. The defendant introduced expert testimony that it was impossible for the bus to start while any portion of the decedent's clothing or his body was caught in the rear door of the bus.

Mr. Feldman, an engineer of the defendant company, was supervisor of automotive maintenance of the Capital Transit Company, and stated he was familiar with the safety devices on the buses (App. 92). He described what he called a sensitive edge which consisted of a wire cable running perpendicularly within the rubber edges of the rear doors. This was connected with a micro-switch so that if anything became caught within the rear doors as they closed, the switch would cause the rear door to open automatically and a light to appear on the dashboard of the bus (App. 93). He further stated that the operator had no control over the rear doors but that they were automatically controlled by the passenger (App. 94). When the rear doors were completely closed an interlocking system went into effect, a light went on upon the dashboard, and an audible sound of the air exhaust notified the operator that all passengers were safely discharged. He further stated that if an object of less diameter than an inch or inch and a half was caught between the sensitive edges of the door the object would be carried away, or if a person was holding such object it would slide out (App. 96). The witness stated that an overcoat having less thickness than that required to activate the sensitive cable would not cause the safety device to come into play (App. 96). If the cloth was thicker than an inch and one-half the bus doors would immediately come open and the brakes automatically apply. Mr. Feldman testified that if a passenger's clothing of less diameter than the inch or inch and a half required to activate the sensitive edge, was caught in the door, the door would absolutely not hold his clothing when the bus started to move (App. 97). If it was of sufficient width to activate the sensitive edge the bus could not proceed. Upon the motion of the defendant the Court adjourned to the outside of the Court House, where the very bus that caused the fatal accident was located.

and the witness demonstrated the efficacy of the safety devices. However, the safety devices failed to work properly and the witness stated:

“this is most unusual” (App. 102)

The defendant also produced the testimony of the witness Higdon, who is an Inspector for the Department of Vehicles and Traffic of the District of Columbia, to indicate that an inspection of the bus was made on March 24, 1948, the day after the accident. He found no defects in the rear doors at the time of his inspection. However, in his inspection he did not test the bus doors with a man's coat at any time. (App. 116)

The witness Dulasky was seated three or four seats forward of the rear door. He could not see how many passengers left the bus by the rear door, but he heard people stepping on the treadle of the rear door and that it went down several times (App. 151).

The witness Burroughs testified that he was seated directly opposite the rear door and saw two ladies get off the bus but saw no gentlemen get off (App. 154). However, he indicated on cross examination the following:

“Q. Are you sure that only two got off?

“A. Others could have gotten off. I do know there were two women who got off.” (App. 156)

The witness was deaf (App. 158).

The operator of the bus did not know whether the deceased was a passenger or not (App. 83), nor how many passengers got off the bus at the fatal scene from either the front or rear door. He had no recollection as to whether he used his mirror to see that all had safely alighted from the rear door (App. 84). He heard the air discharge, but did not remember whether the panel light went on or off (App. 72). The side windows of the

bus were foggy (App. 72). He knew that no one was waiting to board the bus (App. 73).

Counsel submits that a question of fact existed which compelled submitting the issue to the jury. It would have been error to direct a finding for the defendant. (See authorities cited on page 3 *supra*)

II

It Was the Duty of the Trial Court to Instruct the Jury Urging a Decision If They Could Conscientiously Do So

The appellant complains of the supplementary charge given by the Court after the foreman indicated that the jury was unable to agree. Counsel restricted his objection to:

“MR. HORNING: I want to object to the granting of the Allen Charge in a civil case. I think this case has been thoroughly presented by both sides. All of the evidence is in and any charge designed to coerce a settlement would not be in the interests of justice in a civil case. (App. 169)

“THE COURT: I will have to overrule your objection.

“MR. HORNING: Yes, Your Honor.”

Be it observed that counsel did not object that the charge was given prematurely. The defendant did not propose or suggest that the charge as given was inadequate or lacked clarity or should be more guarded or needed the elaboration now suggested. There was no request by counsel to instruct the jury that none of them should surrender their conscientious convictions. However, the Court admonished the jury that it was their duty to decide the case if they could conscientiously do so.

A general objection to a charge by the Court has been held insufficient and unless counsel distinctly points out

to the Court that part of the charge to which objection is made, he cannot thereafter complain. cf. *Rule 51 F. R. C. P.*, 28 U. S. C. A. *Federal Rules 51*, and cases cited under note 10; *Barron and Holtzoff*, Vol. 2, page 799, Sect. 1104; *Palmer v. Hoffman*, 318 U. S. 109, 87 L. E. 645; *Shokuwan Shimabukuro v. Higeyoshi Nagayama*, 140 F. (2) 13, 78 U. S. App. D. C. 271; *Washington & G. R. R. v. Varnell*, 98 U. S. 479, 25 L. E. 233; *Allis v. U. S.*, 155 U. S. 117, 39 L. E. 91; *Flint v. Youngstown Sheet & Tube Co.* (CCA 2nd 1944) 143 F. (2) 923, 925; *Globe Furniture v. Gately*, 279 F. 1005, 51 App. D. C. 367, 369; *McDermott v. Severe*, 25 App. D. C. 276, affirmed 202 U. S. 600, 610, 50 L. E. 1162; *Washington Railway & Electric Co. v. Wash. Term.*, 44 App. D. C. 470; *D. C. v. Duryee*, 29 App. D. C. 327; *Traver v. Smolik*, 43 App. D. C. 150; *Reid's Branson Instructions to Juries*, 3rd Edition, Vol. 1, page 138, sect. 45 and sect. 173, pages 460, 463, 464.

We believe the Court's supplementary charge to have been fair, impartial and consistent with established principles of law. There was no suggestion by the trial judge to the jury that it would be kept together for an unreasonable time. There was no comment that they must agree. There was no emphasis by the Court. It was conciliatory in tone, language and fashion.

It will be observed that the Court indicated to the jury that the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusions of his fellows. Further, it was their duty to decide the case if they could conscientiously do so. (App. 169). This language has received sanction of the Supreme Court, this Court, and many other Federal and State courts.

Counsel had agreed on the Court's original charge. It was omitted from the appendix but is contained in the

record at pages 464, 480, and is set forth in the appendix to this brief. (p. 20)

The issues were simple and were clearly stated by the Court in its charge. If the decedent was a passenger on the bus and was caught in the doors before he had safely alighted the defendant was liable. If he was intoxicated, as claimed by the defendant, and walked into the rear door, with resultant death, the defendant was not liable.

The appellant complains that the "Allen Charge" should not be given in a civil case. However, many, many authorities, both Federal and state, have approved the charge. cf. *Hoagland v. Chestnut Farms*, 63 App. D. C. 357, 72 F. (2) 729; *Hill v. Wabash Railway Co.* (CCA 8th) 1 F. (2) 626; *Railway Express Agency, Inc. v. Mackay* (CCA 8th) 181 F. (2) 257; *Chicago & E. & I. Ry. Co. v. Sellers* (CCA 8th) 5 F. (2) 31; *Lehigh Valley Railway Co. v. Allied Machinery Co.* (CCA 2nd) 271 F. 900, 904; *Boston & M. R. R. v. Stewart* (CCA 1st) 254 F. 14, 18; *Copley v. Stone*, 75 F. S. 203 (D. C. S. C.).

This Court, in the case of *Hoagland v. Chestnut Farms*, 63 App. D. C. 357, 72 F. (2) 729, 732, a negligence case resulting in personal injuries, affirmed the application of the doctrine. The Court said:

"In the eighth assignment of error complaint is made concerning the court's language to the jury under the following circumstances: After the original submission of the case to the jury, and after they had deliberated for some time, they were brought back into court and in response to a question by the court the foreman stated that they had not been able to reach a verdict. Whereupon the court said to them that it appeared to the court that they should be able to agree upon a verdict and that they should listen to a discussion of the evidence to see if they could not reach a conclusion and dispose of the

case, which had been expensive to litigants and would involve further expense if it had to be retried. At the same time, the court said, 'None of you should return a verdict against your conscientious views,' and also, 'I think if you can conscientiously get together you should do so.' The jury was then returned to their room and came to an agreement which they recorded as their verdict. This procedure was not erroneous. In *Allen v. United States*, 164 U. S. 492, 501, 17 S. Ct. 154, 157, 41 L. Ed. 528, opinion by Mr. Justice Brown, it is said: 'While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments, and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment, or that he should close his ears to the arguments of men who are equally honest and intelligent as himself. There was no error in these instructions.' "

Be it remembered that Judge Pine in the instant case stated it was the jury's duty to return a verdict if it *could conscientiously do so*.

The *Hill case*, *supra*, was an action for damages to lumber resulting from a fire, which was communicated to the lumber by a locomotive of the railroad company. The Trial Court there instructed as Judge Pine did in this case. The Court of Appeals for the eighth circuit in affirming the charge stated, Page 631:

"This court, in *St. Louis & S. F. R. Co. v. Bishard*, 147 Fed. 496, said: 'The proper limits of the author-

ity of a trial court when a jury is having difficulty in reaching a verdict were expressed by the Supreme Court in *Allis v. U. S.*, 155 U. S. 117, 123, 15 Sup. Ct. 36, 39 L. Ed. 91, in *Allen v. U. S.*, 164 U. S. 492, 501, 17 Sup. Ct. 154, 41 L. Ed. 528, and in *Burton v. U. S.*, 196 U. S. 283, 307, 25 Sup. Ct. 243, 49 L. Ed. 482. It is true these were criminal cases, but we know of no reason why their doctrine is not equally applicable to cases of a civil character. * * *"

The doctrine, long judicially sanctioned by Federal appellate courts, that it is not only the right but the duty of the trial judge in the exercise of his discretion to endeavor to reconcile the difficulties presenting themselves to the jury is found in the following state cases:

St. Louis Railway Co. v. Carter, 111 Ark. 285, 164 S. W. 719

Hutchins v. Haffner, 63 Colo. 365, 167 Pac. 966, LRA 1918 A, 1008

Kahan v. Pure Oil Co., 186 Okla. 493, 98 Pac. (2) 894

South Carolina Public Service Authority v. Spearwant, 196 S. C. 481, 13 S. E. (2) 605

There is an annotation set forth in 109 A. L. R. 85, wherein the author states:

"As in criminal cases, so also in civil cases, the trial judge may in his discretion, instruct minority jurors to weigh the opinion of the majority and to question seriously the correctness of their own opinions.

The following authorities were cited: Pages 85, 86

United States—Lehigh Valley R. Co. v. Allied Machinery Co. (1921); C. C. A. 2nd) 271 F. 900 (writ of certiorari denied in 1921) 256 U. S. 704, 65 L. ed. 1180, 41 S. Ct. 625, and writ of error dismissed in (1921) 257 U. S. 614, 66 L. ed. 398, 42 S. Ct. 93); *Boston & M. R. Co. v. Stewart* (1918; C. C. A. 1st) 254 F. 14; *Hill v. Wabash R. Co.* (1924; C. C. A. 8th) 1 F. (2d) 626.

Arkansas—Midland Valley R. Co. v. Barkley (1927) 172 Ark. 898, 291 S. W. 431 (reversed on other grounds in (1928) 276 U. S. 482, 72 L. ed. 664, 48 S. Ct. 342).

Georgia—Dauton Fruit & Produce Co. v. Puryear (1918) 22 Ga. App. 489, 96 S. E. 344.

Kansas—Karner v. Kansas City Elev. R. Co. (1910) 82 Kan. 842, 109 P. 676.

Maine—Cowan v. Umbagog Pulp Co. (1897) 91 Me. 26, 39 A. 340.

Minnesota—Gibson v. Minneapolis St. P. & S. Ste. M. R. Co. (1893) 55 Minn. 177, 56 N. W. 686, 43 Am. St. Rep. 482.

New Hampshire—Ahearn v. Mann (1881) 60 N. H. 472.

North Dakota—Lathrop v. Fargo-Moorhead Street R. Co. (1912) 23 N. D. 246, 136 N. W. 88.

Pennsylvania—Girard Trust Co. v. Page (1925) 282 Pa. 174, 127 A. 458.

Sound public policy dictates, and it is the duty of the court to urge upon the jury earnest effort to agree. This is particularly true when a case has been tried twice.

In view of the foregoing authorities and the rather narrow and simple issues involved in this case, we believe the appellant cannot complain of the resultant verdict. After approximately three (3) hours of deliberation the jury reported that it was unable to agree. The court then instructed as indicated (R. 169-170). A verdict was reached in twenty (20) minutes. This, it would seem, demonstrated that only a small minority were in disagreement and their difficulties capable of reconciliation with the view of the majority. There was not the slightest indication of coercion. The jury was not polled.

Chicago & E. I. Ry. Co. v. Sellers, 5 F 2, 31, relied upon by the appellant, is quite distinct. There the jury stated to the Court:

“It was no use to keep them together longer.”
 “That they were unable to agree.”

Further the jury had returned twice for instructions. More issues were involved than here. There, the Court said that if an attempt was made to break down the individual judgment and honest conviction of a jurymen in order to reach a conclusion, the verdict could not stand.

Here, Judge Pine unequivocally stated: (App. 169)

“The verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his fellows; * * * it is their duty to decide the case if they can conscientiously do so.”

Mendelson v. U. S., 61 App. D. C. 127, 58 F (2) 532, (1932), relied upon by the appellant, sustains the position of the appellee. In that case the jury was out thirty (30) hours. Here it was out less than five (5) hours, including luncheon time. Further, this Court held that whether a supplementary charge should be given and length of a jury deliberation should be left to the discretion of a trial judge. In the *Mendelson* case there was no indication that the jury needed supplementary instructions. Here, after only four (4) hours deliberation, the jury indicated it could not agree. The first trial of this case some three (3) months prior to the instant trial resulted in a disagreement. Appellee submits that supplementary instructions such as given below were required in the interest of the administration of justice.

The complaint by the appellant that the charge was given too soon after deliberation began was long ago answered by the Supreme Court of the United States in *Allis v. U. S.*, 155 U. S. 117, 39 L. Ed. 91, 94 (1894). There it was said:

"It is a familiar practice to recall a jury after they have been deliberation for any length of time for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment. The time at which such a recall shall be made, if at all, must be left to the sound discretion of the trial court, and there is nothing in the record to show that the court, in the case at bar abused this discretion or failed to wait a reasonable time for the consideration of the case by the jury under the charge as already given."

In *Bord v. U. S.*, 76 U. S. App. D. C. 205, 207, 133 F (2) 313, this Court held an admonition to the minority members of a jury not to be "bull headed" or "stubborn" did not show coercion even though the language was strong. There was no such language here.

The appellant says much about the maximum verdict. This is pure sophistry. The plaintiff below was entitled to the maximum verdict permitted by the law in force at the time of the death of the decedent, or she was entitled to nothing. The deceased had a life expectancy of twenty-six (26) years and was earning more than \$4,000 per year. He had a wife and three small children, all dependent upon him for support. The expectancy of life for the widow was twenty-six (26) years. The children's minority continued for nine (9), ten (10) and twenty (20) years, respectively. Indeed the maximum was insufficient.

The law in effect within sixty (60) days after the decedent died permitted unlimited recovery, subject only to discretionary review by the courts. *Title 16, Sect. 1201, D. C. Code (1949), as amended on June 16, 1948.* Today, a much larger verdict would be sustained.

Other authorities cited by the appellant are hardly comparable. It relies upon *Neely v. Travellers Insurance Co.*, 141 Kan. 691, 696, 42 Pac. (2) 958, 960. There the trial court characterized the disagreement as senseless and as one arising out of personal quarrels among the jurymen. It stated that a hung jury was an abhorrence to taxpayers, an abomination to the court and a reproach to the jury, and that any differences that existed among the jury were caused by egotism, perversity and ill will. The court rightly condemned such a charge and stated that no juror, unless he had exceptional strength of mind and character, would dare face the obloquy threatened by the court. However, in that very case, the Supreme Court of Kansas quoted with approval the case of *Sibley v. Cotton Mills*, 85 Kan. 256, 116 Pac. 889, where the court stressed to the jury the importance of agreement and even intimated it might be kept overnight and also referred to the expense of a second trial.

The language used in the *Sibley* case, *supra*, and approved in the *Neely* case, *supra*, upon which the appellant relies, stated:

“While recognizing the importance of allowing the jury independence of action within their rightful sphere it does not appear that the Court invaded their province or went beyond the boundaries of judicial discretion.”

The case of *Cranston v. New York Central and H. R. R. R.*, 103 N. Y. 614, 617, 9 N. E. 500, was decided ten (10) years prior to the Supreme Court's decision in *Allen v. U. S.*, *supra*. In that case the jury reported that there was no probability of agreement but the trial court insisted:

“You must get together. * * * No juror ought to remain entirely firm in his own conviction until he has made up his mind beyond all question that he is necessarily right and all others are wrong.”

This, also, is far different from the instant case.

Finally, the appellant relies upon *Acunto v. Equitable Life Assurance Society*, 60 N. Y. S. (2) 101, 102. The charge was similar to that which was given below. The Court divided, three to two, with the majority criticizing the rule adopted by the Supreme Court.

Be that as it may, we invite the attention of the Court to the dissenting opinion of two of the five judges in that case wherein it was stated:

“Though the portion of the additional charge now made the basis for a reversal, taken by itself, might be construed as an exhortation to the minority group in the jury to agree with the majority, I find therein no ground for setting aside the judgment as no proper exception was taken by the defendant to the language employed. Had defendant specifically called attention to the particular language now challenged and had he stated to the Trial Court that such instruction constituted a command to the minority to reexamine its views in the light of the opinion held by the majority, it is reasonable to assume that the Trial Judge would have corrected his remarks by adding that a like duty was placed on the majority respecting the opinion of the minority. Defendant’s failure to specify its objection to the precise portion of the charge which is believed to be erroneous makes the exception valueless. An exception to a charge of the Court must point out the specific part of the charge deemed wrong so that the Court may have an opportunity to correct the error, if error was committed.

“By merely taking a general exception to the supplemental charge, which consisted of three long paragraphs, the defendant has placed himself in a position of gambling with the jury’s verdict and still reserving the right, in the event of an unfavorable verdict, to specify the nature of its exception in the appellate tribunal. The Trial Court is the forum in

which the exception should have been amplified in the first instance."

We believe this point advanced by appellant to be ill taken.

CONCLUSION

The judgment below should be affirmed.

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APPENDIX TO APPELLEE'S BRIEF

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Charge to the Jury

THE COURT (Pine, J.): Members of the jury, this case has been fairly, fully and ably tried by counsel who not only protect the high ideals of our profession but who practice and keep alive in their practice those high ideals.

When a case is tried to a jury, the court consists of the judge and the jury. Each has a separate duty and responsibility and function. The duty of the Judge is to preside at the trial, pass on questions of law as they arise, including questions in respect of the admissibility of evidence and, finally, at this stage to charge the jury which simply means to give the jury those principles of law applicable to the case. That is the Judge's function and responsibility and it is his exclusively.

The jury may not trespass upon it. The jury is obliged to follow the law as the Judge gives it to you.

The jury has the function and duty and responsibility of ascertaining the facts. The jury is the fact finding body and then, after ascertaining the facts, it is the jury's duty to apply the law to the facts and reach a proper verdict.

In finding the facts, the jury, as the sole judges of the facts, may look only to the evidence and inferences reasonably deductible from the evidence. By the evi-

dence I mean the testimony that you have heard
465 from the lips of the witnesses, the exhibits which
have been received in evidence and nothing else.
You may accept as facts the stipulations of counsel as to facts but the evidence is limited to what I have told you.

In performing your duty, you will not allow sympathy or prejudice or emotion of any kind to enter into your

deliberations or into the determination of your verdict. You will find the facts calmly and dispassionately and objectively, bearing in mind that you are the fact-finding branch of the court. You will not guess nor speculate nor conjecture, but, as I have said look exclusively to the evidence and those inferences reasonably and logically deductible therefrom.

Being the sole and exclusive judges of the facts, you are, of necessity, the sole and exclusive judges of the credibility of the witnesses. That is, the amount of credibility which you will give to the testimony of each witness who has appeared before you in open court and, in determining credibility, you will take into consideration their manner, demeanor, and conduct on the witness stand; their ability or lack of ability to see and hear those things about which they testified; their ability or lack of ability to express to you through the medium of words what they have seen or heard; their memory or lack of memory; any bias or prejudice which they may have displayed which may have influenced their
 466 testimony; any interest which they have in the outcome of the case which may have distorted or colored their testimony and any other factors of human nature which, with or without wrongful intention, may obstruct the giving of perfectly true testimony.

In this case the plaintiff, Mary Margaret Howard, brings this action against the Capital Transit Company in a purely representative capacity by reason of her being administratrix of the estate of her late husband. The persons she represents are the next of kin of her husband, namely, herself as widow, and their three children, John, Rosemary and Melissa. They are the real parties in interest, and in that sense are the real plaintiffs. It is compensation for the pecuniary loss suffered by them, if any, which plaintiff is entitled to recover, if she is entitled to recover anything by this action. There-

fore, in considering the instructions I shall give you on the measure of damages applicable to this case, you will regard those real parties in interest as the real plaintiffs to the same effect as if they were named in the complaint.

The party who asserts the affirmative of an issue has the burden of proving it. Therefore, the plaintiff, asserting the affirmative, has the burden of proof by which she must establish the essential elements of her case by a preponderance of the evidence before she may
467 recover. I shall give you those essential elements of her case before I am through.

The preponderance of the evidence is determined not alone by the greater number of witnesses on one side or the other, or the greater number of witnesses testifying to any particular state of facts. The preponderance of the evidence means that the testimony on behalf of the party carrying the burden must have the greater weight, in your estimation; must have the more convincing effect upon your minds when you weigh it and sift it than that which is opposed to it. If you believe that the testimony on any essential point is evenly balanced, your decision as to that point must be against the party carrying the burden of proof.

The law permits me to comment on the evidence, but it is not necessary for me to do so to any great extent in this case, because the facts have been so thoroughly marshaled and summarized by counsel that I do not believe that any extensive comment by me is needed, or would be helpful. But in commenting, so far as I do, please understand that I am not attempting to influence your judgment on the facts, but am only doing so to assist you in understanding the issues which you are called upon to determine. What I say is not evidence.

What counsel have said is not evidence. The evidence is what you have heard from the lips of witnesses and the exhibits and if your recollection differs from
468 theirs or mine, it is your recollection that governs and not theirs and not mine.

You should give careful consideration to the summations of counsel. They are designed to help you and I am sure will help you in the marshaling of facts, the assembling of facts, the organization of facts but you should also consider the arguments of counsel in light of the fact each represents his respective side of this case.

There is no dispute that the plaintiff's intestate came to his death by reason of being run over by a bus of defendant at Connecticut Avenue and McKinley Street. There is no dispute that he left surviving him his widow and three children. There is no dispute that he was 42 years of age and was earning approximately \$4,000 a year. There is no dispute that he supported his wife and children, and assumed the usual duties and obligations and responsibilities of a husband and father.

The principal dispute in this case grows out of how the accident occurred. The mere fact that an accident occurred or that plaintiff's intestate was run over by a bus does not, considered alone, give rise to liability on the part of the Capital Transit Company. Before there can be liability, the plaintiff must show that the driver of the bus was negligent and that his negligence proximately caused plaintiff's intestate to be run over by the bus and killed. Furthermore, there is no presumption or inference of negligence to be imputed from
469 the mere fact that the accident happened.

Quite a little has been said in this case about drunkenness. There is a dispute as to whether or not

the plaintiff's intestate was drunk or was not drunk. That evidence is only permitted because, as counsel has pointed out to you, it sheds light on what occurred, if he was drunk or if he was not drunk. It is the contention, of course, of the plaintiff that he was not drunk and that some mistake occurred in the analysis of the blood.

It is the defendant's contention that he was drunk and that, because of his drunkenness he did something, because of his drunkenness, that was irrational.

Plaintiff claims that the driver of the bus, for whose conduct defendant is responsible, was negligent in starting the bus before the decedent had safely alighted therefrom, and that such negligence proximately caused the decedent's clothes or some portion of his body to be caught within the means of egress from the bus, and decedent to be dragged or thrown under the bus and to his death.

The defendant denies that it was negligent as claimed, and contends that plaintiff's intestate was not on the bus, had not alighted therefrom, did not have any portion of his clothes or his body caught within the means of egress from the bus; but that, by reason of a mind befogged with alcohol, he walked into the side of
470 the bus after the bus started to pull away from the intersection, or attempted to open the rear doors of the bus after they had been closed and after it had started, and fell under the right rear wheel.

The defendant contends, in the alternative, that if the decedent was a passenger, he could not have been caught in the doors and dragged as he was in the act of alighting from the bus because of these mechanical safety devices which, according to defendant's claim, would prevent the bus from starting if a portion of the decedent's

body or clothing of sufficient size to activate the safety mechanism had been interposed between the doors before starting and, if interposed thereafter, would have brought the bus to a stop and, if not of such size, they would have slid out of the door.

The defendant as a common carrier is not an insurer of the safety of its passengers, but is liable for any injuries sustained by a passenger proximately caused by its negligence, and a person once a passenger remains one until he has safely left the bus.

Negligence, when the passenger-carrier relationship exists, is the failure of the carrier to exercise the highest degree of care for the safety of its passengers. That means the highest degree of care and prudence commensurate with the practical operation of the bus. It does not require the carrier to exercise all the care and skill and foresight of which the human mind can conceive, nor such as will free the transportation of passengers from all possible perils; but it does require the carrier to exercise all the care and skill and foresight within reason for the safe carriage of its passengers consistent with the practical operation of the bus.

Plaintiff's case is based entirely on the existence of a passenger-carrier relationship between the decedent and the defendant, and you are not to consider it from the standpoint of a pedestrian who was run over by a bus, as no such case is presented herein.

Generally stated, those are the issues presented by the evidence in respect of liability. On reflection, I don't think I will summarize the evidence any more than it has been summarized by counsel because I think repetition is entirely unnecessary.

The essential elements of plaintiff's claim, which I have referred to, are, therefore, as follows:

First, that decedent was a paid passenger on the bus on the occasion in question;

Second, that defendant was negligent in that its driver started the bus before decedent had safely alighted therefrom; and,

Third, that such negligence proximately caused decedent's clothes or some portion of his body to be caught within the doors of the bus and decedent to be dragged or thrown under the bus.

472 If you find that each and every of these three elements have been established by a preponderance of the evidence, your verdict will be for the plaintiff. If you find that any of these three essential elements have not been established by a preponderance of the evidence, your verdict will be for the defendant.

If you find the defendant liable, then you will come to the question of damages, and it should be such sum as, under all the circumstances of the case, may be fair and reasonable compensation for the pecuniary loss sustained by the widow and three children by reason of the death of Edward T. Howard, not to exceed \$10,000.

The law does not permit you and you must not award the plaintiff any sum for the sorrow, mental distress, and grief that may have been suffered by reason of the death of Mr. Howard.

The sum shall be a single sum representing the aggregate pecuniary loss suffered by the widow and three children. In other words, in the verdict you will not allocate the damages among the next of kin as such damages, if awarded, are distributable according to the statutes of distribution in force in the District of Columbia.

You may consider the expectancy of life as shown by the mortality tables, the health and earning capacity of the decedent, and also the station of life of the parties, and all other facts in evidence that throw
473 light upon the question of pecuniary loss.

According to the mortality tables the expectancy of life of Mr. Howard was 26 years; his widow, about the same, and the expectancy of the children beyond the age of 21 when the obligation of support no longer exists, that is, the obligation of the parents to support a child no longer exists.

These facts are to be considered by you in fixing damages, if you find for the plaintiff. However, this factor of evidence is not by law controlling, but should be considered by you in connection with all other evidence bearing on the issue, such as that pertaining to the health, habits, and activity of the person whose life expectancy is in question.

Of course, these tables are simply an account kept for a great many years of the ages at which men and women die, and take the average of such ages. It is based on persons in ordinary health, but it does not mean that any particular person will live the number of years set forth in these tables, and of course he may die before the life expectancy has expired, or live beyond the life expectancy.

Your verdict will be one of the following:

For the plaintiff, in a single sum arrived at under these instructions; or for the defendant.

When you go to your jury room, you will first
474 select your foreman who will preside over your deliberations and see that each and every one of you is given an opportunity fully to present your views and express his argument. After you have reached your

verdict, which must be unanimous, you will make that fact known to me through the marshal and I shall assemble counsel and receive it.

The verdict will be announced by your foreman. Unless the jury is polled, in which case each of you will be required to announce it. Bear in mind your verdict will be one of the following:

For the plaintiff, in a single sum arrived at under these instructions, or for the defendant.

Have I omitted anything, gentlemen?

MR. HORNING: No, Your Honor.

MR. REILLY: I am satisfied.

THE COURT Very well. You may take the case and proceed to deliberate.

(Thereupon, at 12 o'clock noon, the jury retired to consider of its verdict.)

THE CLERK: The alternate juror, Mr. Bell, is excused until 1:30.

THE COURT: You are excused, Mr. Bell, with the Court's gratitude. Thank you for giving such close attention to the case. Bear in mind those serve who also sit and wait.

(Alternate juror Bell was excused.)

475 (Thereupon, at 4:15 o'clock p. m. the jury returned to the courtroom and the following proceedings were had:)

MR. HORNING: May we approach the bench?

(Thereupon counsel approached the bench and the following proceedings were had:)

(Discussion off the record.)

MR. HORNING: I want to object to the granting of the Allen Charge in a civil case. I think this case has been thoroughly presented by both sides. All of the evidence is in and any charge designed to coerce a settle-

ment would not be in the interests of justice in a civil case.

THE COURT: I will have to overrule your objection.

MR. HORNING: Yes, Your Honor.

(Thereupon counsel resumed their places at the counsel table and the following proceedings were had in the hearing of the jury:)

THE COURT: Members of the jury, I have received this note from your foreman, Mr. Callahan, in which Mr. Callahan states:

“The jury is not able to agree.”

This case has been before you on five days, including today. It is true you have not devoted the whole of each day to the case on every day because of the opening ball game, which was postponed, and MacArthur's day adjournment but, in a sense, it was a rather pro-
 476 tracted case and I am going to give you an instruction which has the approval of the Supreme Court of the United States and I want you to listen attentively and to consider it and return to your jury room and deliberate further after I give this instruction to you.

The jury is instructed that, in a large proportion of cases, absolute certainty cannot be expected; that although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his fellows yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it is their duty to decide the case, if they can conscientiously do so; that they should listen with a disposition to be convinced to each other's argument:

That if much the larger number are for the plaintiff, a dissenting juror should consider whether his views,

which make no impression upon the minds of so many jurors, equally intelligent as himself, are correct.

If, on the other hand, the majority are for the defendant, the minority ought to ask themselves whether their views are correct, which are not concurred in by the majority.

So you will return to the jury room, deliberate further in the light of these additional instructions.

THE FOREMAN: Would you mind if we ask you this: We had a little trouble on the clarification
477 of the three points that we are to find.

THE COURT: I am glad to instruct you further on any question of law. That is a proper question. The three essential elements, you mean?

THE FOREMAN: We didn't quite all remember them the same way. There was a little friction on that.

THE COURT: The essential elements of the plaintiff's case are these:

First, that the decedent, Mr. Howard, was a paid passenger on the bus on the occasion in question;

Second, that the defendant was negligent in that its driver started the bus before the decedent had safely alighted therefrom;

Third, that such negligence proximately caused decedent's clothes or some portion of his body to be caught within the doors of the bus and the decedent to be dragged or thrown under the bus.

Those are the three essential elements. If you find that each and every of those three essential elements have been established by a preponderance of the evidence, as I have defined that term to you, your verdict shall be for the plaintiff. If you find that any of those essential elements have not been established by a preponderance of the evidence, your verdict will be for the defendant.

Is there any other question of law you would
478 like to have amplified?

MR. REILLY: May we approach the bench, if
Your Honor please?

THE COURT: Yes.

(Thereupon counsel approached the bench and the following proceedings were had out of the hearing of the jury:)

MR. REILLY: I think that I used the word the other afternoon which you did not use this morning "paid passenger".

THE COURT: I used that this morning, "paid".

MR. REILLY: I don't think there is any dispute because he had a pass.

THE COURT: That was just to make it legally correct.

MR. REILLY: Just so there is no confusion on that one point about being a paid passenger. We haven't disputed that issue at all. He was a paid passenger.

THE COURT: What do you think?

MR. HORNING: I think Your Honor has charged correctly, as you did this morning, and they have only asked the instruction on the three essential elements.

MR. REILLY: If they need clarification on "paid passenger", I didn't remember it this morning.

THE COURT: Yes, I did.

MR. REILLY: I am perfectly willing to say yes, you did, but I don't believe there has been any dispute
479 that if he was a paid passenger at all, he was a non-paying passenger.

THE COURT: I think you are right about that. The dispute is whether he was a passenger at all, or at least one of the disputes.

MR. REILLY: That is right.

THE COURT: Supposing I say I have used the word "paid" to make it legally correct but there was no dispute if he was a passenger he was a paid passenger

because he was not riding free and say that Mr. Reilly did not hear me use the term "paid" this morning.

MR. HORNING: If Your Honor thinks that is fair.

THE COURT: I think so.

(Thereupon counsel resumed their places at the counsel table and the following proceedings were had in the hearing of the jury:)

THE COURT: Mr. Reilly came to the bench and said he did not hear me use the words this morning of "a paid passenger". I did use them this morning, I thought.

That has little or no significance except as a legal proposition. There is no dispute, as I see it in the evidence, if he were a passenger at all he was a paid passenger. He was not riding free but, of course, for this relationship which I have discussed with you the passenger has to be a paid passenger rather than a passenger who is an employee of the bus company riding free, for instance. In such a case, a standard of conduct would be required and that is not before you today.

Is there anything further on that?

MR. REILLY: No.

THE COURT: Take the case.

THE FOREMAN: Your Honor, I don't know if this is proper but we want to know if we have to find negligence on the rear door only on that point, negligence of the company on the door itself only.

THE COURT: On those three points only. You are not to consider it from the standpoint of a pedestrian being run down.

THE FOREMAN: No, I mean negligence on account of the rear door only.

THE COURT: Negligence in connection with the door?

THE FOREMAN: That is what I wanted to know.

THE COURT: That is all there. There is no evidence to the contrary.

Anything wrong on that?

MR. HORNING: That is all.

MR. REILLY: That is all right.

THE COURT: You cannot speculate on something else that you see.

. . . .

Opinion of the Trial Court, 93 F. S. 578.

PINE, Judge.

Edward T. Howard was run over by a bus operated by defendant, and died almost instantly, without regaining consciousness. Plaintiff, as administratrix of his estate, sued for damages, claiming his death was caused by wrongful act of defendant. Sec. 16-1201, D. C. Code 1940. The jury returned a verdict for plaintiff.

Defendant has moved for judgment n. o. v., or, in the alternative, for a new trial under Rule 50(b), Fed. Rules Civ. Proc. 28 U. S. C. A. In its combined motion it sets forth as grounds therefor the alleged insufficiency of the evidence to support the verdict and the improper admission of evidence.

[1] In considering a motion for judgment n. o. v., the Court must construe the evidence most favorably to the plaintiff and give the plaintiff the full effect of every legitimate inference therefrom. If, upon the evidence so construed, reasonable men might differ, the motion should be denied. On the other hand, if no reasonable man could reach a verdict in favor of the plaintiff, the motion should be granted.¹

The three essential elements of plaintiff's claim as submitted to the jury were: (1) that decedent was a paid passenger; (2) that defendant was negligent in that its

¹ Shewmaker v. Capital Transit Co., 79 U.S. App. D.C. 102, 143 F. 2d 142; Jackson v. Capital Transit Co., 69 App. D.C. 147, 93 F. 2d 380.

driver started the bus before decedent had safely alighted from the rear door thereof; and (3) that such negligence proximately caused decedent's clothes or some portion of his body to be caught within the doors of the bus and decedent to be dragged or thrown under the bus.

[2] Upon consideration of the testimony of the witness Gates in respect of what she saw before and after alighting from the bus, and the testimony of the witnesses in respect of decedent's clothing, the possession by him of a weekly pass purchased for use on defendant's buses, the time he left his place of employment and his activities immediately thereafter, the time he met his death, and the time required to travel by bus from the place of his employment to the place of death, I reach the conclusion that, under the standard above set forth, there is not such an insufficiency of evidence on any of the three elements of plaintiff's claim as would justify the granting of the motion for judgment n. o. v., and accordingly the same is denied.

[3] During the trial there was admitted evidence of defendant's schedules of its buses on the night in question on routes from a point near decedent's place of employment to a point near his home, and evidence that decedent possessed the weekly pass. This evidence was admitted as circumstantial evidence having probative value respecting one of the issues, namely whether defendant was a passenger on the bus. In view of the fact that decedent's lips were sealed and there were no witnesses who could positively identify him as having been a passenger, this evidence was logically relevant and material, and I am aware of no exclusionary rule requiring its rejection. Assuming, arguendo, that this and other evidence had the effect of showing the habit or custom of deceased in using defendant's buses to return home from his place of employment, there is con-

vincing authority for its admissibility for such purposes,² and I am of the opinion that it was not error to admit it, as claimed by defendant in its motion.

Finally, as I view the case in its entirety, the verdict is not so contrary to the clear weight of the evidence as to justify a new trial. The only eyewitness to the accident itself was the witness Gates, who testified that she saw "a man caught in the door of the bus," as it started to move, and gave further elaboration thereon. On this point defendant places its reliance on the testimony that the doors were not shown to be in a state of disrepair, and claims that, absent such a condition, the accident could not have happened as alleged. In other words, defendant claims that the mechanical devices were infallible, assuming good repair. However, a demonstration of the operation of the doors of the bus during the trial, on motion of defendant over opposition by plaintiff, disclosed that certain parts of the rubber edges were less sensitive than others, that the rubber edges could be subjected to considerable lateral pressure before the mechanism was activated, and that when the air pressure was lowered as the result of continued use, the doors would not operate properly.

Accordingly the motion for new trial will likewise be denied.

Counsel will submit appropriate order.

² *Barbour v. Moore*, 10 App. D.C. 30, 53; *Commercial Standard Insurance Co. v. Gordon's Transports*, 6 Cir., 154 F. 2d 390, 394; *Security Mutual Life Insurance Co. v. Kleutsch*, 8 Cir., 169 F. 104, 105; *Chitwood v. U. S.*, 8 Cir., 153 F. 551, 552; 1 *Wigmore, Evidence*, Sec. 92, 93, note 1, 375 et seq. *Thompson v. Bowie*, 4 Wall. 463, 71 U.S. 463, 18 L. Ed. 423, Id., 6 D.C. 91, an earlier case, criticized in *Wigmore, Evidence*, Sec. 96, note 1, is distinguishable. *Small v. Pennsylvania R. Co.*, 65 App. D.C. 112, 115, 80 F. 2d 704, is likewise distinguishable in that it applies to the inadmissibility of prior acts on the issue of negligence. Compare *District of Columbia v. Duryee*, 29 App. D.C. 327, 330.